(3)

NO. 87-1622

In The

Supreme Court of the United States

October Term, 1987

PHILIP BRENDALE,

Petitioner,

vs.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1) Does the Yakima Indian Nation have inherent power to provide comprehensive land use and zoning regulations for the non-incorporated lands of the Yakima Indian Reservation?

2) Does Yakima County threaten the political integrity or economic security of the Yakima Indian Nation by imposing its land use and zoning regulations on the non-incorporated fee lands of the Yakima Indian Reservation owned by non-members which regulations disrupt the comprehensive land use plan and regulations of the Yakima Indian Nation?

3) Was the Court of Appeals correct in determining under a *Montana v. United States,* 450 U.S. 544 (1981) analysis, that the interest of the Yakima Indian Nation, as shaped by federal policy, in providing ultimate land use and zoning regulation for non-Indian owned fee land in the closed area of the Yakima Indian Reservation, outweighed the interests of Yakima County in providing such regulation?

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BRIEF OF RESPONDENT IN OPPOSITION

The respondent, Confederated Tribes and Bands of the Yakima Indian Nation, respectfully prays that the petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit be denied.

STATUTES, TREATIES AND CONSTITUTIONAL PROVISIONS INVOLVED

In addition to those set forth in the Petiton for a Writ of Certiorari, respondent would add:

A. Constitutional Provision:

1. Article I, Section 8, Clause 3:

"To regulate commerce with foreign nations and among the several states, and with the Indian tribes."

———o———

STATEMENT OF THE CASE

The Confederated Tribes and Bands of the Yakima Indian Nation (Yakima Nation) are a composite of fourteen (14) tribes who came together and negotiated a treaty with the United States which was signed by the parties in 1855. The *Treaty with the Yakimas,* was ratified by Congress in 1869, 12 Stat. 951. (34-A) In this Treaty, the Yakima Nation ceded vast areas of land to the United States reserving however an area of land for their use and occupation to themselves which is now known as the Yakima Indian Reservation. (65-A) The *Treaty with the Yakimas,* provided these reserved lands would be for the "exclusive use and benefit" of the Yakima Nation, and that no white man, except those in the employ of the Indian Department, shall be permitted to reside upon said Reservation without permission of the tribe. (67-A)

The Yakima Indian Reservation is located in Southeast Washington. The Reservation's boundaries encompass approximately 1.3 million acres of land, most of which

is located in Yakima County. Of the 1.3 million acres approximately eighty (80%) percent or 1.04 million acres is held in trust by the United States for the benefit of the Yakima Nation or its individual members. The remaining land, approximately 260,000 acres are held in fee by both individual members and by non-Indians. (35-A)

The Yakima Indian Reservation was divided by the Yakima Nation into two (2) areas for purposes of non-members. The Yakima Nation created a "closed" area of the Reservation, access to which is limited to Yakima Nation members and to non-members who receive permits. The remainder of the Reservation is open to non-members without restriction. (35-A)

The closed area of the Reservation consists of 807,000 acres, 740,000 of which are located in Yakima County. There are approximately 715,000 acres of trust land and 25,000 acres of fee land in the closed area within Yakima County. Most of the fee land in the "closed" area in Yakima County is owned by a timber company. (35-A) The "open" area of the Reservation consists of approximately 500,000 acres, 350,000 of which are located in Yakima County. Of this, approximately fifty (50%) percent, or 175,000 acres is trust land and the other fifty (50%) percent, or 175,000 acres is fee land. (7-A)

The "closed" area of the Reservation is relatively undeveloped. There are no permanent residents in the 740,000 acres of "closed" area in Yakima County. (35-A) The closed area is predominantly forest lands (approximately 67 percent) with the balance being classified as range land. Ingress and egress to the closed area is monitored and controlled by four tribally-operated guard stations and by

tribal police and game officers patrolling the interior of the area. (37-A)

The closed area of the Reservation provides a major source of income to the Yakima Nation. Approximately ninety (90%) percent of the annual tribal income is derived from timber harvested therein. (47-A) The closed area of the Reservation also contains many places of cultural and religious significance. (47-A) The closed area also provides an abundance of natural foods and wildlife to tribal members. (47-A) The land use and zoning code of the Yakima Nation regulates all land in the closed area, both trust and fee. The land use and zoning code of Yakima County only regulated the fee land scattered in the confines of the closed area.

The land to which this dispute relates is owned by Philip Brendale, a non-member of the Yakima Nation. Mr. Brendale owns 160 acres of fee land in the forested portion of the closed area. (40-A) In April, 1983, Mr. Brendale submitted a long plat application to Yakima County to divide a twenty-acre parcel into ten two-acre lots, with the intent that the lots be sold as summer cabin or trailer sites. The Yakima Nation challenged the jurisdiction of Yakima County to regulate the use of the Brendale land. The Yakima County Commissioners determined that Yakima County had jurisdiction to determine the land use and zoning for the Brendale land. (42-A)

As a result, an action was commenced by the Yakima Nation in the United States District Court seeking injunctive relief and a declaratory judgment against Yakima County, Mr. Wilkinson and others. The District Court granted a judgment in favor of the Yakima Nation ruling

that the Yakima Nation had a substantial and significant interest in the regulation of land use and zoning of the non-member owned fee lands in the closed area and that Yakima County had no interest in providing such regulation authority. The District Court "balanced" the interest of the Yakima Nation against those of Yakima County. The District Court determined that the Yakima Nation had maintained its inherent authority to regulate non-members in the closed area of the Reservation, and because the interests of the Yakima Nation outweighed those of Yakima County, the District Court ruled that the Yakima Nation had ultimate land use and zoning authority of the non-member owned feel and in the closed area. (57-A)

The Ninth Circuit Court of Appeals affirmed the District Court. In an opinion which consolidated this case, *Whiteside I*, with its companion case, *Whiteside II*, the Court of Appeals held that the Yakima Nation did have inherent authority to regulate non-member owned fee land on the Reservation and that the District Court correctly determined that the interests of the Yakima Nation clearly outweighed those of Yakima County in providing land use and zoning regulation for non-member owned fee land in the closed area of the reservation. (17-A)

REASONS FOR DENYING THE WRIT

A.) Petitioner's Arguments to Support Certiorari have been Previously Rejected by this Court.

This case does not merit certiorari. Petitioner's argument that the Dawes (Allotment) Act (25 U.S.C. Sec. 331 et seq.) and/or Public Law 280 have divested the

Yakima Nation of the inherent sovereign authority to provide civil regulatory authority over the activities of non-members on fee lands has been soundly rejected by this Court in previous cases. *Moe v. Salish and Kootenai Tribes,* 425 U.S. 463 (1976) and *Montana v. United States,* 450 U.S. 544 (1981) both recognize the repudiation of the Allotment Act. In *Moe* at 478-479, this Court recognized that the Indian Reorganization Act (25 U.S.C. Sec. 461 et seq.) and other legislation have reversed the policies behind the Allotment Act. In *Montana* at 559-560 in Footnote 9, this Court continued to recognize the lack of vitality left in the Allotment Act. *Montana* also recognizes that lands allotted in fee under the Allotment Act may be now owned by non-members, and then provides certain tests under which issues of tribal regulation of non-members on fee lands will be measured. The key test set forth by this Court is as follows:

> "A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe."

Montana v. United States, supra, at 566.

Montana and *Moe* make it very clear that the Allotment Act has no bearing whatsoever as to issues involving a tribe's land use and zoning regulation of non-member owned fee lands.

Public Law 280 has no bearing on this issue. This Court has ruled in both *Bryan v. Itasca County,* 426 U.S. 373 (1976) and again in *California v. Cabazon Band of Mission Indians,* 480 U.S. —, 107 S. Ct. 1083 (1987) that Public

Law 280 does not intrude upon inherent tribal regulatory authority. Petitioner's reliance on *Washington v. Yakima Indian Nation,* 439 U.S. 463 (1979) is misplaced. Public Law 280 was enacted to redress the lack of adequate Indian forums for resolving private legal disputes between Indians, and between Indians and other private citizens, by permitting the courts of the states to decide such disputes. *Bryan v. Itasca County, supra,* at 383. It is in this context in which civil laws are extended unto Reservation lands. In construing the purpose and extent of Public Law 280, this Court stated at 384, foootnote 10 as follows:

> "A fair reading of these two clauses suggests that Congress never intended 'civil laws' to mean the entire array of state non-criminal laws, but rather Congress intended civil laws . . . of general application to private persons or private property would include the laws of contract, tort, marriage, divorce, insanity, descent, etc., but would not include laws declaring or implementing the states' sovereign powers, such as the power to tax, grant franchiess, etc. These are not within the fair meaning of 'private' laws."

In *Washington v. Yakima Indian Nation, supra,* the issue concerned whether the partial assumption of civil jurisdiction by the state of Washington was valid. This Court found such partial assumption to be valid in spite of its checkerboard effect. However, Washington's assumption of Public Law 280 jurisdiction did not include laws declaring or implementing the state's sovereign powers. This conclusion is mandated by both *Bryan* and *California v. Cabazon Band of Mission Indians, supra.*

B.) Both the Ninth Circuit and the District Court Decisions were Correct Applications of the Montana Test.

Petitioner argues that both the Ninth Circuit and the District Court failed to properly apply the test of *Montana* to the facts presented as evidence. Petitioner argues that Yakima County's efforts to provide ultimate land use and zoning authority to the fee land owned by non-members in the closed area of the Reservation did not constitute a threat to the political integrity, economic security or health or welfare of the Yakima Nation.[1] Petitioner's argument ignores the record.

The record before the Ninth Circuit and District Court established that the Yakima Nation derives its authority not only implicitly from congressional policy, but explicitly from the *Treaty with the Yakimas,* 12 Stat. 951. Article II and Article V of this treaty and the treaty minutes establish that the Yakima Nation was to remain a sovereign Indian tribe with governmental authority over its land and people. The record before the Ninth Circuit established that this inherent authority has been exercised and maintained by the Yakima Nation since the time of the Treaty. The inherent sovereign authority includes the exercise of land use regulation by a tribe over its lands. *Segundo v. City of Rancho Mirage,* 813 F.2d 1387 (9th Cir. 1987).

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[1] Yakima County chose not to appeal the decision of the District Court in the proceeding below (*Whiteside I*). Petitioner continues to seek to have Yakima County regulate the land use and zoning for his property without the County's participation or apparent support.

The record before the Ninth Circuit also demonstrated that contrary to some Indian tribes,[2] the Yakima Nation and its members have maintained ownership of the vast majority of the Yakima Indian Reservation. This Reservation consists of 1.3 million acres of land. Approximately eighty (80%) percent or 1.04 million acres of this land remains held in trust for the benefit of the Yakima Nation and its individual members. Approximately two-thirds (807,000 acres) of the Reservation is closed to non-members. Of this closed area, 740,000 acres are located in Yakima County. Only 25,000 acres of the closed area within Yakima County are held in fee. Petitioner and Yakima County agreed that the Yakima Nation had authority to regulate the trust lands. Petitioner argues that Yakima County should provide ultimate land use and zoning authority for approximately 3.3 percent of the closed area of the Reservation under a land use and zoning code which violently conflicts with the land use and zoning code which without question regulates the remaining 96.7 percent of the closed area.

The land use and zoning code of the Yakima Nation is designed to protect and enhance the natural resources, natural foods, medicines, game wildlife, and environment of the closed area. Under the land use and zoning code of the Yakima Nation, construction of permanent residences is prohibited. Construction of any building is limited to specific circumstances which involved timber manage-

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[2] For example, in the Puyallup Indian Reservation, the Puyallup tribe had alienated in fee all but 25 acres of the 18,000 acre reservation. *Puyallup Tribe v. Washington Game Dept.,* 433 U.S. 165, 174 (1977) and on the Port Madison Reservation, the Suquamish Indian tribe had alienated in fee, sixty-three (63%) percent of the 7,276 acre reservation. *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 193 (1978).

ment or furtherance of other tribal resources. Yakima County has no roadways in the closed area. Yakima County provides no law enforcement or fire protection in the closed area.

The land use and zoning code of Yakima County would have permitted the construction of single family dwellings, commercial campgrounds, motels, restaurants, bars, and general stores on fee land in the closed area of the Reservation. Such land use would undeniably disrupt the land use and zoning plan of the Yakima Nation. Petitioner had sought approval from Yakima County for a plat, the lots of which were to be sold as cabin or trailer sites. The record before the Ninth Circuit and District Court contained overwhelming evidence of the economic, environmental and cultural objections and concerns to Yakima County's efforts to provide land use and zoning authority to the fee lands owned by non-members in the closed area.

Based on these facts and others, the Ninth Circuit was compelled to conclude that Yakima County's efforts to impose its conflicting zoning code in the closed area of the Reservation was an unmistakable threat to the political integrity and economic security of the Yakima Nation. The record also demonstrated that the interests of the Yakima Nation clearly outweighed those of Yakima County in providing land use and zoning regulation to the fee land owned by non-members in the closed area. As such, the decisions of the Ninth Circuit and the District Court were a correct application of the *Montana* rules.

C.) A Writ of Certiorari is Not Justified by Other Arguments of Petitioner.

Petitioner argues that the creation and enforcement of the closed area of the Reservation violates his Fifth

Amendment rights.[3] Petitioner argues that there are two (2) classes of fee land owned by non-members; one class in the closed area and a second class in the open area of the Reservation. This argument misconstrues the Ninth Circuit decision in *Whiteside II*. Further, even if the Ninth Circuit had sustained the District Court in *Whiteside II*, the classifications made by the Yakima Nation and the District Court would clearly be sustained by legitimate constitutional and governmental objectives. Article I, Sec. 8, Clause 3 gives Congress the power to regulate commerce within Indian tribes. Classifications by tribal governments or the federal courts which result in two (2) classes receiving differing treatment because of legitimate tribal objectives are sustained by this constitutional provision. *Morton v. Mancari,* 417 U.S. 535 (1974). Petitioner's arguments that the Yakima Nation has no inherent power to regulate the land use of his fee land because he does not belong to or can not participate in tribal government has been addressed by this Court and rejected in *United States v. Mazurie,* 419 U.S. 544 (1975).

—o—

[3] Petitioner had challenged the closure on constitutional grounds in a federal court proceeding which occurred prior to the proceeding hereinbelow. The District Court sustained the validity of the "closure" in *United States v. Philip Brendale, et ux.*, C-74-197 (Ed. Wash., 8/27/74)

CONCLUSION

For the foregoing reasons and authorities, certiorari should be denied.

Respectfully submitted,

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APPENDIX A

CONFEDERATED TRIBES and BANDS
of the YAKIMA INDIAN NATION,

Plaintiffs-Appellees

v.

JIM WHITESIDE, et al., Defendants,

and

PHILIP BRENDALE, Defendant-Appellant.
CONFEDERATED TRIBES and BANDS
of the YAKIMA INDIAN NATION,

Plaintiffs-Appellants,

v.

COUNTY of YAKIMA, et al.,

Defendants-Appellees.

Nos. 85-4316, 85-4433 and 85-4383.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Nov. 6, 1986.

Decided Sept. 21, 1987.

Yakima Indian Nation brought two actions seeking declaratory judgments and injunctions upholding its right to impose its zoning and land use laws on fee land owned by non-Indians within reservation. The United States District Court for the Eastern District of Washington, JUSTIN L. QUACKENBUSH, J., 617 F.Supp. 735, 617 F. Supp. 750, held in part for Indian Tribe, and in part for county, and appeals were taken. The Court of Appeals,

Fletcher, J., held that: (1) county was precluded from zoning fee land within closed area of Indian reservation, and (2) remand was required to balance federal, tribal and county's interests in imposing zoning ordinances on fee land owned by non-Indians in open area of reservation. First case affirmed; second case reversed and remanded.

1. Indians 32(10)

Statute granting state courts jurisdiction over civil litigation involving reservation Indians did not intrude upon tribal regulatory authority, and thus did not affect Indian tribe's authority to zone. West's RCWA 37.12.010; 18 U.S.C.A. § 1162; 28 U.S.C.A. § 1360.

2. Indians 32(8)

States may impose laws on non-Indians engaged in activities upon Indian reservations unless given law is preempted by federal law or unless it unlawfully infringes on right of reservation Indians to self-government; court must balance interests of federal, tribal and state authorities to determine whether state is precluded from regulating particular conduct of non-Indians on Indian reservations

3. Indians 32(10)

Indian tribe had authority to zone non-Indian fee land within reservation boundaries.

4. Indians 32(10)

County was precluded from zoning land owned in fee by non-Indian within closed area of reservation given significant interests of Indian tribe, as shaped by federal policy of recognizing Indian sovereignty and encouraging

tribal self-government, and absence of any interest of county beyond general interest in providing regulatory functions to its taxpaying citizens.

5. Indians 32(10)

Remand was required, in zoning dispute between county and Indian tribe, for factual determination of whether interest of tribe, as shaped by federal policy of recognizing Indian sovereignty and encouraging tribal selfgovernment, outweighed interest of county in imposing zoning ordinances on fee land owned by non-Indians in open area of reservation.

James B. Hovis, Yakima, Washington, for plaintiffs-appellants.

Charles C. Flower, Jeffrey C. Sullivan, David A. Thompson, and Patrick Andreotti, Yakima, Washington, for defendants-appellees.

Appeal from the United States District Court for the Eastern District of Washington.

Before SKOPIL, FLETCHER and POOLE, Circuit Judges.

FLETCHER, Circuit Judge:

The Confederated Tribes and Bands of the Yakima Indian Nation (Yakima Nation) brought these two cases in federal court seeking a declaratory judgment and an injunction barring the defendants from making or permitting any land use within the Yakima Indian Reserva-

tion that is contrary to the Amended Zoning Regulations of the Yakima Nation. In *Whiteside I,* 617 F.Supp. 735, the district court found that Yakima Nation's interests in zoning fee land owned by non-members within the closed area of the reservation were infringed by the application of Yakima County's (the County) zoning ordinances and therefore precluded county zoning. By contrast, in *Whiteside II,* 617 F.Supp. 750, the district court found that Yakima Nation did not have the authority to zone non-Indian fee land in the "open" area, and permitted application of the County's ordinances.

Defendant Philip Brendale, record owner of fee land in the closed area at issue in *Whiteside I,* appeals on the ground that Yakima Nation has no interest in regulating fee land owned by non-members. We affirm the judgment in *Whiteside I.* Yakima Nation appeals the judgment in *Whiteside II* and argues that the tribe has the authority to zone non-Indian fee land in the open area, and further that the federal and tribal interests outweigh the County's interest in regulating the land. We agree that Yakima Nation possesses the requisite authority to zone, and remand to the district court to balance the federal, tribal and County's interests.

FACTS

I. Whiteside I

The Yakima Indian Reservation is composed of 1.3 million acres of land. Of this amount, about 807,000 acres, including 740,000 acres in Yakima County, fall within the reservation's closed area. Only 25,000 acres of the closed area within Yakima County are held in fee. The closed area is restricted to members of Yakima Nation

and permittees in order to protect and enhance its natural resources, natural foods, medicines, game wildlife, and environment. Much of the closed area is forested with timber, a mainstay of Yakima Nation's economic operations. The closed area is relatively undeveloped. There are no permanent residents in the part of the closed area located in Yakima County.

In 1970, Yakima Nation adopted its first zoning ordinance. The ordinance was made more comprehensive in 1972. The tribal code provides for five categories of districts: agricultural, residential, commercial, industrial and restricted. It also establishes requirements for building permits, authorizes the creation of Planned Development Districts, and provides for special use permits. Under the tribal code, only the following uses are permitted in the closed area:

1. Harvesting wild crops;

2. Grazing, timber production or open field crops;

3. Hunting or fishing by Tribal members;

4. Camping in temporary structures;

5. Tribal camps for the education and recreation of tribal members.

6. Construction and occupancy of buildings and structures constructed by the Yakima Nation or the Bureau of Indian Affairs to be used in the furtherance of tribal resources;

7. No building or other permanent structure or any appurtenances thereto other than those allowed in Sections 1-6 above shall be allowed in this district;

8. Any structure which is authorized in Sections 1-6 above shall be set back 200 feet from any waterway.

Yakima County has regulated land use since 1946, but passed its first comprehensive zoning ordinance in 1965. Within the reservation, the County regulates fee land but not trust land. The County zoned the closed area as "forest watershed," which permits such structures as single family dwellings, commercial campgrounds, overnight lodging facilities with less than sixteen units, restaurants, bars, and general stores. The forest-watershed district is designed to conserve land and water while accommodating pressures for residential, recreational and commercial uses. The County has other land-use regulations applicable to fee land. These include the 1974 subdivision ordinance, which impose standards for streets, water, sewage, drainage, parks and recreation areas, and school sites the Yakima County Shoreline Master Program and a federal flood insurance program.

The Brendale property consists of 160 acres of fee land within the forested portion of the closed area. The nearest county road is over twenty miles away. In January, 1982, Brendale filed four contiguous short plat applications with the Yakima County Planning Department, which issued a Declaration of Non-Significance and later approved the applications. In April, 1983, he submitted a long plat application to divide one of his new twenty-acre parcels into ten two-acre lots. He intended the lots to be sold as summer cabin or trailer sites. The County Planning Department issued a Declaration of Non-Significance, which Yakima Nation appealed on the grounds that the County did not have authority to regulate the Brendale land and that the development would significantly affect

the environment. The Commissioners found that the County had jurisdiction, but that an Environmental Impact Statement (EIS) should be prepared. Yakima Nation brought this suit as the County began work on EIS.

II. Whiteside II

Approximately half of the land in the open area is held in fee. Most of the open area is rangeland, and land used for agriculture, and residential and commercial developments. Agriculture and related activities are the primary source of income. Non-members are permitted to move freely in this area. The County maintains an extensive road system of nearly five hundred miles throughout the open area. Most of the fee land lies within the three incorporated towns of Toppenish, Wapato and Harrah. The rest is scattered throughout the reservation in a checkerboard pattern, some clustered in particular areas. Roughly eighty percent of the population of the open area, including that of the incorporated towns, are non-members of Yakima Nation. It appears that neither Yakima Nation nor the County regulates land use within the incorporated towns.

Under Yakima Nation's Amended Zoning Ordinance, the Wilkinson property is zoned "agricultural." This designation indicates that the "principal use of the land is for agricultural purposes." All buildings are prohibited except agriculture related buildings, agriculture product processing plants, buildings on public parks and playgrounds and single family dwellings. The minimum lot size is five acres. This is the only type of agricultural district under the Yakima Nation's Code.

The County's agricultural zones include three types: "exclusive agricultural," "general agricultural," and "general rural." Under "exclusive agricultural" lot size minimums are forty acres, under 'general agricultural," twenty acres, and under "general rural," one acre. The County has designated the Wilkinson property as "general rural." This zoning is intended to "'provide protection for the county's unique resources and land base;' 'minimize scattered rural developments . . . by encouraging clustered development;' and 'permit only those uses which are compatible with [the] rural character.'" District court opinion in *Whiteside II*, at 753. The number and variety of uses possible under special use permits is considerably greater than those allowed within exclusive and general agricultural districts. As noted above, the County has other extensive land-use regulations.

The Wilkinson property is a forty-acre tract of fee land about three-quarters of a mile south of the reservation's northern boundary. The City of Yakima is three miles to the north of the tract. The property is vacant sagebrush land.

In September, 1983, Wilkinson applied to the Yakima County Planning Department to subdivide thirty-two acres into twenty lots ranging in size from 1.1 to 4.5 acres, each lot to be used for a single family residence. Wilkinson submitted an environmental checklist from which the Planning Department initially determined that an EIS was required. However, the Planning Department issued a Declaration of Non-Significance after Wilkinson agreed to modify his proposal. Yakima Nation appealed, arguing that the County was without authority to regulate and that the proposal would significantly affect the environ-

ment. The Commissioners affirmed and Yakima Nation filed suit in federal court.

DISCUSSION

I. *Public Law 280*

[1] Brendale and the County maintain that Washington's enactment of Wash.Rev.Code § 37.12.010, adopted pursuant to Pub.L. No. 280, 67 Stat. 588 (1953) *as amended*, 18 U.S.C. § 1162, 28 U.S.C. § 1360 (1982 and Supp. III 1985) (Public Law 280), divested Yakima Nation of authority to regulate the activities of non-Indians on fee-owned land within reservation boundaries. This argument lacks merit. Public Law 280 grants state courts jurisdiction over civil litigation involving reservation Indians, but does not intrude upon tribal regulatory authority. *California v. Cabazon Band of Mission Indians*, — U.S. —, 107 S.Ct. 1083, 1087-88, 94 L.Ed.2d 244 (1987). Because zoning is clearly regulatory, Public Law 280 does not affect Yakima Nation's authority to zone.

II. *Preemption and Infringement*

[2] Yakima Nation's claim, in essence, is that the state, acting through the County, is barred from imposing its zoning ordinances to control non-member fee land on the reservation. States may impose laws on non-members engaged in activities on Indian reservations unless a given law is preempted by federal law or unless it "'unlawfully infringes on the right of reservation Indians to self-government"' *United States v. Anderson*, 736 F.2d 1358, 1363 (9th Cir. 1984) (quoting *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 51 (9th Cir.), *cert. denied*, 454 U.S. 1092, 102 S.Ct. 657, 70 L.Ed.2d 630 (1981). We must balance

the interests of federal, tribal and state authorities to determine whether a state is precluded from regulating particular conduct of non-members on Indian reservations. *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 145, 100 S.Ct. 2578, 2584, 65 L.Ed.2d 665 (1980); *see also Segundo v. City of Rancho Mirage,* 813 F.2d 1387, 1391 (9th Cir. 1987).

1. *Federal Preemption*

Yakima Nation asserts that federal law preempts the application of state law. It lists a number of federal statutes that Yakima Nation maintains embody federal policy to provide for tribal self-government and protection of reservation resources. Broad preemptive effect is accorded not only specific federal statutes, but the policies animating them. *Ramah Navajo School Bd. v. Bureau of Revenue,* 458 U.S. 832, 838, 102 S.Ct. 3394, 3398, 73 L.Ed. 2d 1174 (1982). We therefore construe preemption generously, and may find preemption even if Congress has not expressly stated an intention to preempt state law. *Id.*

Yakima Nation is correct that many of these statutes, *see, e.g.,* Indian Financing Act of 1974, 25 U.S.C. § 1451 *et seq.* (1982); *Indian Child Welfare Act of 1978,* 25 U.S.C. § 1901 *et seq.* (1982); Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 *et seq.* (1982), embody and advance a broad federal policy of recognizing Indian sovereignty and encouraging tribal self-government. *See New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 334-35 & n. 17, 103 S.Ct. 2378, 2386-87 & n. 17, 76 L.Ed.2d 611 (1983). Others facilitate and encourage tribal management of Indian resources. Of particular note, the Indian Self-Determination and Education Assistance Act, 25 U.S.C.

§ 450 *et seq.* (1982 and Supp. III 1985), authorizes the Secretary of the Interior, upon a tribe's request, to enter into a contract with the tribe, to reallocate management of land use programs involving trust land, including zoning, from the federal government to the tribe. 25 C.F.R. § 271.32 (1986). These statutes may not establish the "comprehensive and detailed federal involvement in or regulation of the particular tribal activity," *Chemehuevi Indian Tribe v. California State Bd. of Equalization,* 800 F.2d 1446, 1448 (9th Cir. 1986), *cert. denied,* — U.S. —, 107 S.Ct. 2184, 95 L.Ed.2d 840 (1987), necessary to find federal preemption, that existed in *Bracker,* 448 U.S. at 145-48, 100 S.Ct. at 2584-86, or in *Segundo,* 813 F.2d at 1392-94. At a minimum, however, they embody a federal policy that informs our inquiry concerning the reach of Indian sovereignty.

2. *Tribal Authority*

Before we may consider Yakima nation's interest in regulating non-member fee land, we must determine whether it possesses the requisite regulatory authority. The Supreme Court has long recognized the inherent "attributes of sovereignty [in Indian tribes] over both their members and their territory." *Iowa Mut. Ins. Co. v. LaPlante,* — U.S. —, 107 S.Ct. 971, 975, 94 L.Ed.2d 10 (1987) (quoting *United States v. Mazurie,* 419 U.S. 544, 557, 95 S.Ct. 710, 717, 42 L.Ed.2d 706 (1975)). Yakima Nation derives authority not only implicitly from its status as a dependent sovereign, but explicitly from the Treaty with the Yakimas, 12 Stat. 951, 2 Kapplers 524 (1855), in which Yakima Nation and the United States agreed that Yakima

Nation reserved to itself and was guaranteed a right to its "own government" and its "own laws."

Tribal authority extends to regulation over the activities of non-Indians on reservation lands. *Iowa Mutual,* 107 S.Ct. at 978. Such authority, however, is more limited than that over Indians. The Supreme Court has, without apparent consistency, applied two tests to determine the limit on tribal authority over the conduct of non-Indians. In *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980), the Court held that tribal sovereignty is divested only when its exercise is inconsistent with overriding federal interests. "[I]t must be remembered that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *Id.* at 154, 100 S.Ct. at 2081. Nine months later, the Supreme Court in *Montana v. United States,* 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), reiterated language disregarded by *Colville,* that Indian tribes have been implicitly divested of their sovereignty to regulate relations between the tribe and nonmembers by virtue of their dependent status. *Id.* at 563-64, 101 S.Ct. at 1257-58 (citing *United States v. Wheeler,* 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978)). The Court held that the "exercise of tribal power beyond what is necessary to protect tribal selfgovernment or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Id.* 450 U.S. at 564, 101 S.Ct. at 1258.

The *Montana* Court identified two exceptions to the limitation on tribal regulatory authority over non-members. The exceptions stem from inherent tribal authority

over the tribe's members and to manage its territory as well as the power to exclude non-members from its reservation. *Anderson,* 736 F.2d at 1364; *Babbitt Ford, Inc. v. Navajo Indian Tribe,* 710 F.2d 587, 592 (9th Cir. 1983), *cert. denied,* 466 U.S. 926, 104 S.Ct. 1707, 80 L.Ed.2d 180 (1984). A tribe retains authority to regulate "the activities of nonmembers who enter consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements." *Montana,* 450 U.S. at 565, 100 S.Ct. at 1258. A tribe also retains inherent regulatory authority over the conduct of non-Indians on fee land when the conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566, 100 S.Ct. at 1258 (the "tribal interest" test).

[3] Yakima Nation asserts that we should apply the *Colville* test and hold that it has authority to zone non-Indian fee land under that test. Because we conclude that Yakima Nation has authority under the more stringent tribal-interest test employed in *Montana,* we need not determine whether the *Colville* analysis is appropriate to determine tribal authority over non-Indians.[1]

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[1]Most of our cases have applied the *Montana* test, without referring to the conflicting language in *Colville,* to determine whether a tribe has the power to regulate non-Indians within reservation boundaries. *See, e.g., United States v. Anderson,* 736 F.2d 1358 (9th Cir. 1984); *Babitt Ford, Inc. v. Navajo Indian Tribe,* 710 F.2d 587 (9th Cir. 1983), *cert denied,* 466 U.S. 926, 10 S.Ct.1707, 80 L.Ed.2d 587 *cert. denied,* 466 U.S. 926, 104 S.C. 1707, 80 L.Ed.2d 180 (1984); *Cardin v. De La Cruz,* 671 F.2d 363 (9th Cir.), *cert. denied,* 459 U.S. 967, 103 S.Ct. 293, 74 L.Ed.2d 2277 (1982) We did, however, apply both tests in *Confederated Salish and Kooteenai Tribes v. Namen,* 665 F.2d 951 (9th Cir), *cert. denied,* 459 U.S. 977, 103 S.Ct. 314, 74 L.Ed. 2d 291 (1982)

We recently held that "[i]t is beyond question that land use regulation is within the Tribe's legitimate sovereign authority over its lands." *Segundo*, 813 F.2d at 1393 (holding that a city could not apply its rent control ordinance in conflict with tribal ordinance to non-Indians on reservation trust land)). Zoning, in particular, traditionally has been considered an appropriate exercise of the police power of a local government, precisely because it is designed to promote the health and welfare of its citizens. *See Knight v. Shoshone and Arapahoe Indian Tribes of the Wind River Reservation*, 670 F.2d 900, 903 (10th Cir. 1982); *see generally Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). By enacting zoning ordinances, a tribe attempts to protect against the damage caused by uncontrolled development, which can affect all of the residents and land of the reservation.[2] Tribal zoning is particularly important because of the unique relationship of Indians to their lands. Comment, *Jurisdiction to Zone Indian Reservations*, 53 Wash.L.Rev. 677, 680 (1978). Further, a major goal of zoning is the "systematic and coordinated utiliza-

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[2]The Yakima Nation's Code sets out its purpose:

The controls as set forth in this ordinance are deemed necessary in order to encourage the most appropriate use of the land; to protect the social and economical stability of residential, agricultural, commercial, industrial, forest, reserved and other areas within the reservation, and to assure the orderly development of such large areas; and to obviate the menace to the public safety resulting from the improper location of buildings and the uses thereof, and the establishment of land uses along primary highways in such a manner as to cause interference with existing and proposed traffic movement on said highways; and to otherwise promote the public health, safety, morale and general welfare in accordance with the rights reserved by the Yakima Indian Nation.

tion of land" in a particular area. N. Williams, *American Land Planning Law*, § 1.06 (1974), *cited in* Comment, 53 Wash.L.Rev. at 679. Comprehensive planning enables a centralized regulatory authority to balance the competing needs of landowners and to distribute land uses in a desirable pattern. *Id.* at § 1.08, *cited in* Comment, 53 Wash. L.Rev. at 685. Yakima Nation has exclusive authority to zone tribal trust land, which constitutes nearly all of the closed area and over half of the open area. Although the fee land owned by non-Indians is clustered primarily in one part of the reservation, the reservation still exhibits essentially a checkerboard pattern. If we were to deny Yakima Nation the right to regulate fee land owned by non-Indians, we would destroy their capacity to engage in comprehensive planning, so fundamental to a zoning scheme. This we are unwilling to do.

3. *Balance of Interests*

Having concluded that Yakima Nation has the authority to zone non-Indian fee land within the reservation boundaries, we must consider whether the interests of Yakima Nation, as shaped by federal policy, outweigh those of the County. We review the district court's findings of fact, including its balancing of the interests, under a clearly erroneous standard.

A. *Whiteside I*

[4] In addition to its general interest in asserting political authority—an interest that, as noted above, federal policy seeks to advance—Yakima Nation has a significant interest in zoning the closed area of the reservation. To protect grazing, forest and wildlife resources, Yakima

Nation restricted the closed area to its members and permittees in 1954 and the Bureau of Indian Affairs restricted use of federally maintained roads in the closed area in 1972. The closed area is relatively undeveloped, with no permanent residences in the Yakima County portion of the area, and residences in other portions predate the zoning ordinance. The closed area, which is about two-thirds forested, provides substantial economic support to the tribe through timber operations, and supplies many Yakima Nation members with a food supply. Its religious and spiritual value also motivates the Yakima Nation's protection of the closed area from development.

The district court found that the Brendale development would cause disruption of Yakima Nation's interests. Construction and use of roads and cabins would cause soil disturbance and erosion, deterioration of ambient air quality, change of water absorption rates and draiange patterns, destruction of some trees and natural vegetation, likely alteration of migration patterns of deer and elk, increased noise levels and thicker population density. Development would necessitate new police and fire services.

The County's zoning classification, if applied, would permit the construction of such structures as single family dwellings, commercial campgrounds, overnight lodging facilities with less than six units, restaurants, and bars in the restricted area. The imminence of such construction is suggested by the fact that Brendale, himself, has stated he intends to build other developments on land adjacent to the property which is the subject of this suit. The district court's recognition of Yakima Nation's concern with maintaining the character of the closed area indicates that

the court properly focused on Yakima Nation's interest in regulating the entire closed area, including the Brendale property.[3]

By contrast, Brendale has not identified any interest the County has in regulating the closed area. The district court noted that the only interest asserted by the County was a general interest in providing regulatory functions to its taxpaying citizens. Further, Brendale has not argued that the Yakima Nation's regulation of the closed area has an effect outside the boundaries of the reservation.[4]

We conclude that the district court properly found that the County is precluded from zoning fee land within the closed area because the County's interest in imposing its regulation is outweighed by the significant interests of Yakima Nation.

B. *Whiteside II*

Yakima Nation has alleged a number of justifications for regulating the open area and in particular the Wilkin-

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[3]Brendale points out that Yakima Nation constructed a permanent structure of twelve dormitory cabins and two larger buildings in the closed area. Even if Brendale's development would have no greater impact on the closed area than the Yakima Nation's structure, a question the district court never considered, we believe the proper analysis addresses the multiplied burden of potential additional development that could occur if the Yakima Nation zoning ordinance were revoked.

[4]Perhaps noteworthy, the County, itself, did not join Brendale in appealing the district court's decision.

son property.[5] The County, by contrast, has not suggested any off-reservation interest in imposing its zoning code on fee land within the reservation. *See Mescalero Apache,* 462 U.S. at 336, 103 S.Ct. at 2387 ("The exercise of state authority which imposes additional burdens on a tribal enterprise must ordinarily be justified by functions or services performed by the State in connection with the on-reservation activity. Thus a State seeking to impose a tax on a transaction between a tribe and nonmembers must point to more than its general interest in raising revenues. A State's regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate state intervention.") (citations omitted).

[5] We conclude, however, that for this court to weigh the varying interests at this time would be premature. Because the district court found that Yakima Nation lacked the authority to zone fee land owned by non-Indians within the open area, it did not make findings of fact concerning the interests asserted, nor did it bal-

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[5]As alleged, Yakima Nation's interest in controlling land use in the open area, although obviously less compelling than that in the closed area, appears also to be strong. The open area is largely used for agriculture, upon which many tribal members depend for their livelihood. Specifically with regard to the Wilkinson property, Yakima Nation has asserted that the proposal would require the construction of new roads and could alter the flow and quantity of ground water. Yakima Nation alleges that there is a substantial danger of severe erosion and runoff from the subdivision and that the comtemplated change in the land use of the Wilkinson parcel and development of the surrounding area, would interfere with Yakima Nation's interest in the integrity of its culture and way of life. Sacred burial grounds are located in the area. Finally, Yakima Nation alleges that increased development would require additional police services.

ance the federal, tribal, and state interests. We therefore remand to the district court the issue of whether the interests of Yakima Nation, as shaped by federal policy, outweigh the interests of the County in imposing zoning ordinances on fee land owned by non-Indians in the open area.

CONCLUSION

The district court's judgment in *Whiteside I* is affirmed. Its judgment in *Whiteside II* is reversed and remanded.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, Plaintiff, vs. JIM WHITESIDE, GRAHAM TOLLEFSON, CHARLES KLARICH, RICHARD ANDERWALD, PHILIP BRENDALE and FRANK GLASPEY, Defendants.	NO. C-83-604-JLQ February 2, 1984 Yakima, Washington 4:30 o'clock P.M.

ORAL DECISION

The Honorable Justin L. Quackenbush,
Judge.

APPEARANCES:

On behalf of the Plaintiff:
HOVIS, COCKRILL, WEAVER & BJUR
By: JAMES B. HOVIS
Attorney at Law
316 North Third St.
Yakima, WA 98907

On behalf of Defendants Whiteside, Tollefson, Anderwald and Klarich:
OFFICE OF THE PROSECUTING ATTORNEY
By: JEFFREY C. SULLIVAN
Yakima County Courthouse
Yakima, WA 98901

On behalf of the Defendants Brendale and Glaspey:
FLOWER & ANDREOTTI
By: CHARLES C. FLOWER
Attorney at Law
303 East "D" Street
Yakima, WA 98901

FEBRUARY 2, 1984
AFTERNOON SESSION.

THE COURT: In this case and during the trial of this case I believe it was yesterday afternoon, I suggested to the parties that it appears to me that a reasonable resolution of this matter would be or could be accomplished by a rational, dispassionate discussion of the issues between the parties. That, obviously, has not taken place throughout the history, the relatively short history of this matter. Therefore, it is incumbent upon me to, one, find the facts in this case, which I will do, and secondly, to apply the law as it exists to those facts and in that way determine this matter.

My preference as to a resolution without the necessity of this litigation have nothing whatsoever to do with my decision in this matter. Obviously, I would prefer a reasonable compromise between the parties. I will decide the case without any regard whatsoever to what my

preferences would be. I have an obligation and I took an oath to decide the case based upon the law of the land. This action by the Yakima Indian Nation seeks to restrain the proposed residential development by Mr. Brendale in the closed or timbered section of the Yakima Reservation. The county, without passing upon the merits of the individual proposal, has determined that it has jurisdiction over this land, and, therefore, the authority to issue the appropriate ordinances and/or permits to Mr. Brendale if, in their discretion, the county commissioners determine that the proposed development after consideration of an EIS, which they have required, is an appropriate one.

I'm sure it is clear to counsel, but I want it made clear to the parties and to others in attendance, that this decision is limited to the Brendale property and the property within the closed area of the Yakima Reservation.

I accept the line as shown on the exhibit that we have utilized. The question of jurisdiction in the area to the east of the closed area is the subject of another action pending in this court, which is to be heard by this court in March. I will decide that case based upon the individual facts presented to the court during that trial. I am going to decide this case based upon the record that has been made this week in this individual case.

The issues raised in this action involving the closed area of the Yakima Reservation requires an analysis by me of the inherent powers retained by the Tribe as opposed to those powers of the Tribe of which they have been divested. This action involves the issue of the power of the Tribe to regulate land use rather than any claim by

the Tribe to regulate persons on their fee land such as a claim of criminal jurisdiction which we all acknowledge was decided in *Oliphant;* to-wit, that the Tribe does not have criminal jurisdiction over non-Indians.

The Yakima Indian Reservation was established in 1855 by treaty. A treaty is, in fact, a form of a contract or agreement. Both sides, the United States of America and the Indian Nation, are bound by the terms of the treaty or contract. The Tribe in that treaty gave up their rights to their millions of acres of land to which they laid claim in exchange for the promises which were made by the United States of America. It is recognized and established that Congress has the right to alter the terms of the treaty and, in fact, as I suggested during argument, could terminate the very existence of this or any other Indian reservation, but only after paying just compensation.

The history of the dealing by Congress with the Tribes after treaties, after the United States had entered into agreements causes many people great concern. Congress went from the position of an agreement or a treaty to one of assimilation, to one of the Dawes Act of allotments, on then to the somewhat recent philsophy of termination, and now it seems we have come full circle back to a philosophy of soverign immunity. Those matters, of course, are political decisions for Congress. I, of course, am bound by the acts of Congress as interpreted by the courts of the United States.

Despite this history, the Indian Tribes have long been recognized as soverign entities possession attributes of sovereignty over both their members and their territory.

This sovereignty, however, is not absolute. The Tribe is limited by the terms of the treaty. The Tribe is limited by the laws as passed by Congress, and to some extent the Tribes are also limited by their dependent status. As a result of this, the Tribes no longer possess the full attributes of a sovereignty.

It is undisputed that the Indian Tribes have jurisdiction over Indians on their reservation. It is undisputed that the Tribes, likewise, have jurisdiction over the Indian lands. The most difficult and unanswered, in my opinion, jurisdictional question is that before the Court: The question of the power of the Indian Tribes to regulate fee lands owned by non-Indians, which lands, fee lands, are located within the boundaries of an Indian reservation.

I feel that the law is clear that Indian Tribes retain the inherent power to exercise some form of civil jurisdiction over non-Indians on the reservation. This power, however, is limited as is set forth by the numerous decisions of the Supreme Court and the appellate courts. In this case, I must follow the teachings of the United States Supreme Court.

One of its most recent decisions is the New Mexico case, *New Mexico v. Mescalero Apache Tribe* decided by the United States Supreme Court on June 13th of 1983. In that case, the Court recognized that there must be a demarcation of the spheres of jurisdiction as between state or local and tribal authority in and on Indian reservations. The Court pointed out that the United States Supreme Court has continued to stress that Indian Tribes

are unique aggregations, once again possessing attributes of sovereignty over both their members and their territory. Under some circumstances, a state or local government may exercise concurrent jurisdiction over non-Indians on tribal reservations; however, that authority may only be asserted if, in fact, there is some showing of a legal basis as argued by counsel for the defendants; to-wit, Public Law 280, and only if that authority of the Tribe has not been preempted by the operation of Federal law, and also that the authority of the state or local government has not been preempted by Federal law.

In this case, I have determined that Public Law 280 does not preempt the exercise by the Tribe of its authority over the land here in question located in the closed area. Much discussion and debate has taken place concerning the case of *Montana v. The United States,* but that decision came down from the Supreme Court in 1980. The subsequent decisions of the United States Supreme Court have not retreated from the language found in that case; to-wit, that a Tribe may and does retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the Tribe.

In my opinion, the cultural needs and the culture itself of the Yakima Indian Nation as presented in this case clearly establish that the cultural interests, whether they be associated with the religious interests or not, are strong as they relate to the closed area in the Yakima Indian Reservation.

I adopt the findings of the county commissioners at the time of the hearing on the declaration of non-significance. Clearly the action proposed by Mr. Brendale is to take place in the center of a large undeveloped forest. I asked Mr. Brendale and invited, I'm sure, testimony, if it was available from counsel, as to whether or not within the closed area other than the structures, the permanent structures erected by the Tribe for its specific uses, if there was a permanent residence on fee land within the closed area. Evidently, none exist within Yakima County, which I find from the evidence and testimony of Mr. Williams comprises 740,000 acres in the closed area in Yakima County. There are 25,000 acres of fee land within the closed area in Yakima County. Eighteen thousand acres of that fee land is owned by the St. Regis Lumber Company. Based upon those figures, which I find to be true, ninety-seven percent of the land within the closed area is non-fee land; to-wit, either Indian owned or trust lands. Utilizing the 18,000 acres of fee land owned by St. Regis, that would leave some 7,000 acres, or one percent of the land not owned by either the Tribe or allottees, or the St. Regis Lumber Company.

I adopt the findings of the Board of County Comissioners set forth in Exhibit 7. Since I intend to finalize this decision by way of a written opinion, I will not recite those specific items at this time.

I further find from the testimony that this area is one of great value, not monetarily necessarily, but culturally and historically and religiously to the Yakima Indian Nation and to the individual members of both young and old.

I conclude and I find that the development of the Brendale property for residential uses is completely incompatible with the uses to which the Tribe has put its land since, in fact, the treaty and before then. I find that the logging of the land is in the manner in which the Tribe is harvesting the timber is not inconsistent whatsoever with the deep feeling that the members of the Tribe have concerning this closed area. Based upon those findings and the other findings which I will incorporate in the written opinion, I find that in fact the prongs or tests set forth in the *Montana* case have been met by the Tribe.

I find that development within the closed area in a manner such as proposed by Mr. Brendale is completely inconsistent with the political integrity, the economic security, and particularly the health and welfare of members of the Yakima Tribe, who, I find to, in fact, rever this area as being the land of their ancestors. I, therefore, find that the Yakima Indian Nation has the authority to require compliance with the zoning code of the Yakima Indian Nation.

With regard to the Public Law 280 argument, I agree thoroughly with you, Mr. Sullivan, that we would have had a bright line if someone, and it's difficult for me to believe that it wasn't raised in *Cardin vs. DeLaCruz,* if someone would have raised the issue when it was ripe on the *Cardin* issue, but it was not raised, I must make the decision and I am satisfied that Public Law 280 did not, in fact, divest the Tribe of their inherent right to manage or to apply their zoning code to the very limited fee land owned by non-Indians in the closed area under

these facts and circumstances. This is a unique case. I question if there is another area such as this in view of the prior policy, that somewhat vacillating policy from Congress towards the Indians that has a forested area, an area of cultural significance with the roots and berries and the artifacts which I find are important matters, cultural matters, religious matters to the Indian Tribe that has this limited amount of fee land.

With regard to the question of concurrency; to-wit, does Yakima County have the authority to concurrently impose their zoning ordinance in this case on the closed area, as I have indicated there are some circumstances whereby a state may exercise concurrent jurisdiction, and a strong argument can be made that by reason of Public Law 280 whereby Congress gave the state of Washington civil and criminal jurisdiction that the state and the local governments have, in fact, concurrent jurisdiction. However, the analysis does not stop there.

Even with Public Law 280, I believe that the sovereignty which the Tribe has over the lands within their boundaries, and in this case within the closed area, are such that the analysis must follow as to whether or not the Public Law 280 jurisdiction or the local jurisdiction has been preempted by Federal law. This determination, the question of preemption, cannot be made upon the usual mechanical analysis of the basic principles of preemption.

In cases of the Supreme Court and of the Circuit Court of Appeals, the analysis does not stop at the question of state law versus Indian Tribes. The *Bracker* case cited to the Court by counsel recognizes the unique historical origins of Tribes which are recognized, and the unique historical origins of those Tribes' sovereignty and the Federal commitment to Tribal self-sufficiency make it, ". . . treacherous to utilize only those basic notions of preemption." Those cases have, in fact, rejected a very narrow focus on congressional intent, and those cases have also rejected the proposition of preemption requiring an express congressional statement to that effect; that, to-wit, under these circumstances state or local authority is preempted.

The exercise of state or local authority which imposes additional burdens upon the Tribe must ordinarily be justified by the functions or services to be performed by that local government or by that state in the exercise of its alleged on reservation jurisdiction. This requires the court to analyze the reasons claimed by the local government for its attempt to exercise the regulatory function.

In this case, I find that the county has failed to identify regulatory function or service that would justify the assertion by the county of concurrent regulatory authority. I likewise find that the county has failed to point to any off reservation effects that would warrant intervention by the county in the imposition of the county zoning ordinance on this property located in the middle of a 740,000 acre undeveloped tract. For those reasons, I find that Federal law preempts the exercise or the imposition of the county zoning ordinance upon fee land owned by non-Indians located within the closed area of the Yakima Indian Reservation.

As indicated, I will place my decision in final written form; however, before we get to that final aspect of this

case, we have the 1983 claim, and in view of the amendment, the qualified immunity claim and affirmative defense set forth by Mr. Sullivan. I will allow you, Mr. Hovis, fifteen days to respond, and do you want to be in a position of responding at this point, Mr. Flower, or would you prefer to reply with Mr. Sullivan?

MR. FLOWER: We would like to respond, Judge.

THE COURT: All right. I will allow you fifteen days, and I'll allow you ten days to reply, Mr. Sullivan.

MR. SULLIVAN: Thank you, your Honor.

THE COURT: I might say, as you know we alternate three or four months at a time coming here to Yakima, and we start back in March. What is the date?

THE CLERK OF THE COURT: The 19th.

THE COURT: It may well be if you desire to argue the 1983 issue, the entitlement of the Tribe to damages, we should be in a position of being able to accomodate you during that week of the 19th, if anyone wants argument.

MR. FLOWER: Unless the laws have changed and are different, I don't think there would be any need to. Obviously, I think on March 19th, I'll be here anyway, and so will Hovis.

THE COURT: What is that?

MR. FLOWER: Whiteside II.

THE COURT: Whiteside II is in May.

THE CLERK OF THE COURT: Pretrial conference is in April and the trial is in May.

THE COURT: Well, be here if you wish to argue the 1983 issue.

Pending the written decision which I will prepare in this matter, and I recognize, Mr. Flower, that you would like to move this matter along and get the final order entered, but I do need to make the decision on the 1983 civil rights portion. I would hope that I would be in a position to have that done by the time we are back here in March. But, if either side wants an oral argument on the 1983 issue, notify Mrs. Buckner within fifteen days. You can do it in your brief. If you just specify oral argument waived or requested, and if you would do that, too, Mr. Flower.

MR. FLOWER: Surely.

THE COURT: And if you wish argument, Mr. Hovis, if you just send a letter to the Clerk as to oral argument.

MR. HOVIS: Thank you, your Honor.

(Whereupon, hearing was concluded in this matter at 5:00 o'clock, P.M., February 2, 1984.)

CERTIFICATE

STATE OF WASHINGTON)
) ss.
COUNTY OF SPOKANE)

I, Mia M. Bohn, RPR, do hereby certify that I am an Official Court Reporter in the United States District Court;

That as such Official Court Reporter, I atended the proceedings in the foregoing entitled matter;

That I took down in shorthand all oral testimony adduced and proceedings had;

That such shorthand was reduced to writing under my supervision;

That the foregoing pages of typewritten matter contain a true and accurate excerpt of proceedings taken from my shorthand notes as aforesaid.

/s/ _____
MIA M. BOHN, RPR
Official Reporter
U.S. District Court
Eastern Dist. of Wash.
Spokane, Washington

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT O FWASHINGTON

YAKIMA INDIAN NATION,	)	
Plaintiff,	)	NO. C-83-604-JLQ
vs.	)	MEMORANDUM OPINION
WHITESIDE, et al.,	)	
Defendants.	)	

The Yakima Indian Nation (Yakima Nation) brought this suit seeking a declaratory judgment and injunction barring the defendants from taking or permitting any land use within the "Closed Area" which is contrary to the Amended Zoning Regulations of the Yakima Nation (Yakima Nation Code). The named defendants are the Yakima County Commissioners, the Director of Yakima County Planning Department, and Philip Brendale, record owner of fee land within the exterior boundaries of the Yakima Indian Reservation (Reservation).[1] Specifically, the plaintiff seeks to impose its zoning and land use law on a development proposed by defendant Brendale within the so-called "Closed" area of the Reservation. Additionally, the Yakima Nation seeks the court to limit Yakima

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[1] In addition to those defendants, the complaint also named Frank Glaspey, codeveloper of the proposed Brendale property development. By court Order dated February 10, 1984, defendant Glaspey was dismissed with prejudice. (Ct. Rec. 127).

County's regulatory authority over this property to the extent that the County's laws would allow land uses inconsistent with those permitted by the plaintiff. In other words, the plaintiff seeks a judicial declaration that its regulatory jurisdiction over Brendale's property is paramount and exclusive.

The plaintiff's complaint also contains allegations of civil rights deprivations. More particularly, the Yakima Nation contends that the County's assertion of its zoning jurisdiction over the Brendale property violated Section 1 of the Civil Rights Act of 1871. (Codified at 28 U.S.C. § 1983).

The court has previously entered both a Temporary Restraining Order and a Preliminary Injunction which restrained defendant Brendale from changing the land use of the subject property (Ct. Rec. 12, 42). Thereafter, a four day trial was held and at its conclusion the court ...ered an oral decision favorable to the plaintiff.[2] (Ct. Rec. 128). What follows is the court's written opinion including its Findings of Fact and Conclusions of Law. This written opinion shall supplement the court's oral opinion.

FACTUAL BACKGROUND

The Yakima Indian Nation is a composite of fourteen (14) originally distinct Indian tribes who banded together in the mid-1900's for the purpose of negotiating with the

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[2] The court's oral decision encompassed only the plaintiff's request for a declaratory judgment on the regulatory jurisdiction issue. The Yakima Nation's Section 1983 claim was expressly excluded from the oral decision but is addressed in this written opinion.

United States. Pursuant to a treaty signed in 1855 and ratified in 1869, 12 Stat. 951, these various tribes ceded vast areas of land but also reserved an area for their "exclusive use and benefit". This reserved area is the Yakima Nation Indian Reservation (Reservation).

The Reservation is located in southeastern Washington. It's exterior boundary encompasses approximately 1.3 million acres of land. Of this amount, about eighty percent of the land is held in trust by the United States for the benefit of the Tribe or its individual members (trust lands). The remaining land is held in fee by Indians or non-Indian owners (fee land). The majority of this fee land lies within the three incorporated towns in the northeastern part of the reservation—Toppenish, Wapato and Harrah. The remainder is scattered throughout the reservation creating the now familiar "checkerboard" effect. The fee lands fall within the boundaries of Klickitat, Lewis and Yakima Counties.

Most of the trust land lies within the Reservation's "Closed Area". This area occupies essentially the western two-thirds of the Reservation. It covers approximately 807,000 acres, 740,000 of which fall within Yakima County. Of this latter figure, 25,000 acres are fee land. The Closed Area is predominantly forested (about two-thirds), the balance being classified as range land. The topography of this area varies from the gently sloping range land along its eastern edge, to deep river valleys in the central part and finally to the mountain peaks of the Cascade Range along its western boundary. A state-maintained highway, U.S. 97, cuts across the southeastern portion of the area and several Bureau of Indian Affairs

(BIA) maintained arterials provide access to the closed area's interior.

Apart from the "exclusive use and benefit" language in the treaty, it is unclear when the "Closed Area" was officially declared off-limits to the general public. It is undisputed that by Tribal Resolution dated August 11, 1954, the area was declared "to remain closed to the general public" to "protect the [Closed Area's] grazing, forest and wildlife resources." Entry into the area was restricted to enrolled members of the Yakima Tribe, official employees, permittees and persons with bona fide business and property interests. Access to the area was further limited when, in May 1972, the BIA restricted the use of the federally maintained roads within the Closed Area to Tribal members and permittees who were either record land owners or associated with the Yakima Nation through employment, business, or in some way directly benefitting the Yakima Nation.[3]

The Yakima Nation currently has a Courtesy Permit System which has expanded the original categories of permittees to include spouses and dependents of enrolled members, plus special groups or dignitaries visiting the reservation. For the stated purpose of the "protection and enhancement of its [Closed Area] natural resources, natural foods, medicines, game wildlife, [and] environ-

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3 Defendant Brendale judicially challenged this closure on equal protection grounds but the court concluded no violation occurred. *United States v. Philip Brendale, et ux,* C-74-197 (E.D. Wash. Aug. 27, 1974) (memorandum decision). In a later action, however, Mr. Brendale was granted an easement by necessity. *Brendale v. Olney, et al.,* C-78-145 (E.D. Wash. Mar. 2, 1981) (memorandum decision).

ment . . ." the permitted uses are limited to sightseeing, hiking, camping and tribal, BIA, or family related business or activity. Permittees (*i.e.* non-tribal members) are specifically prohibited from hunting, fishing, boating, drinking, operating vehicles off established roads, camping at other than designated campsites and removing flora, fauna, petrified wood, other valuable rocks or minerals or artifacts. Ingress and egress is monitored and controlled by four tribally-operated guard stations. Tribal police and game officers patrol the interior of the area.

Tribal Land Use Regulations:

In October 1970 the Yakima Nation instituted its first zoning Ordinance. That ordinance was a six-page Tribal Resolution modeled after a similar Yakima County ordinance. The Zoning Ordinance designated all areas within the exterior boundaries of the reservation, both trust and fee lands (except the incorporated cities and towns) as being within the General Use District. All otherwise lawful uses were generally permitted except certain activities requiring a conditional use permit. *E.g.,* asphalt mixing plants, junk yards, certain feedlots, above ground storage tanks, etc. The Board of Adjustment, composed of all the members of the Tribal Council, sat as the Board of Appeals from administrative decisions and the Hearing Board for conditional use applications. Its decisions were final tribal action.

In May 1972, the Yakima Nation adopted a new zoning law, the Amended Zoning Ordinance, which remains in effect today. Like its predecessor, the Amended Zoning Ordinance expressly is made applicable to fee land. Besides that similarity, this twenty-seven page document re-

sembles the original ordinance only in the composition of the Board of Adjustments and its function. Otherwise, it is much more detailed and comprehensive. Among other things, it establishes a requirement for building permits, minimum lot sizes, authorizes the establishment of Planned Development Districts, provides for Special Use Permits and creates five categories of Use Districts. These Use Districts are: Agricultural, Residential, Commercial, Industrial, and Reservation Restricted Area.

The Reservation Restricted Area is another term for the Closed Area. It was established as a "special use district" to insure continuation of the Tribal natural resources and to insure the Treaty right of tribal members to have an area in which they can camp, hunt, fish, and gather roots and berries in the tradition of their culture. Within this district only the following uses are permitted:

1. Harvesting wild crops;
2. Grazing, timber production or open field crops;
3. Hunting or fishing by Tribal members;
4. Camping in temporary structures;
5. Tribal camps for the education and recreation of tribal members;
6. Construction and occupancy of buildings and structures constructed by the Yakima Nation or the Bureau of Indian Affairs to be used in the furtherance of tribal resources;
7. No building or other permanent structure or any appurtenances thereto other than those allowed in Sections 1-6 above shall be allowed in this district;
8. Any structure which is authorized in Sections 1-6 above shall be set back 200 feet from any waterway.

These limited uses are the primary source of the present action.

Yakima County Land Use Regulations:

As early as 1946 the County of Yakima regulated land use within its boundaries. This regulation was, however, not extensive until 1965 when the county adopted its first zoning ordinance which, as stated previously, was the model for the Yakima Nation's initial zoning ordinance.

The present comprehensive zoning regulations, The Yakima County Code, was first enacted in 1972. It was struck down for a procedural defect, but readopted in its same form in October, 1974. Within its seventy-two pages, the Yakima County Code identifies numerous specified use districts which generally regulate agricultural, residential, commercial, industrial, and forest-watershed uses. In the reservation area, the official county zoning map segregates the fee lands from the trust lands. The county does not apply its zoning law to trust lands.

The fee lands within the Closed Area are zoned "forest watershed". This designation allows a diversity of uses including, for example, single family dwellings; commercial camp grounds; overnight lodging facilities having less than sixteen (16) units; restaurants, bars; general stores; souvenir shops; service stations, marinas, saw mills and the construction of dams for the production of electricity. The minimum lot size for this use district is one-half acre, but the average size of any subdivision or short plat must be two acres. The stated purpose for the Forest-Watershed District is to facilitate land and water conservation while accommodating residential, recreational and commercial uses.

In addition to its comprehensive zoning regulations, Yakima County has other land use regulations applicable

to fee land within the county. Its 1974 Subdivision Ordinance imposes standards for streets, water, sewage, drainage, parks and recreation areas, and school sites. The Yakima County Shoreline Master Program, adopted in 1974 as mandated by state law, regulates certain activities adjacent to shorelines. Also as a participant in the federal flood insurance program the county attempts to control flood plain development, although it is not clear whether any Closed Area fee lands lie within an identified flood plain. Another of Yakima County's state-mandated land use regulations is its Environmental Ordinance which requires a review of the potential environmental impact of all non-exempt land use actions. None of the above-described regulations have been applied to trust lands on the Yakima Nation Reservation.

The Brendale Property:

Defendant Brendale owns a 160 acre tract of fee land approximately in the center of the forested portion of the Closed Area.[4] The 160 acre parcel was originally allotted to Brendale's great aunt, a member of the Yakima Nation, and later inherited by Brendale's mother and grandfather who were issued a fee patent in 1963. At his mother's death in 1972, the fee parcel passed to Philip Brendale.

In January, 1982, Philip Brendale filed four contiguous short plat applications with the Yakima County Planning Department. In compliance with the Environmental Ordinance, Mr. Brendale submitted an Environmental

[4] Although Philip Brendale is partially of Indian blood, he is not a member of the Yakima Nation as his blood quantum apparently is not sufficient to entitle him to enrolled status in the Yakima Nation.

Checklist from which the planning department could assess the potential impact of his proposed development and decide whether an Environmental Impact Statement (EIS) was warranted. Having determined that the short platting did not require an EIS because it would not significantly affect the environment, the planning department issued a "Declaration of Non-Significance". Thereafter, the department notified interested parties, including the Yakima Nation, of its determination and requested comments. At the end of the comment period, during which no reply from the Yakima Nation was received, the short plats were approved.[5]

Approximately one year later, in April 1983, Mr. Brendale submitted a long plat application to divide one of his newly platted twenty-acre parcels into ten two-acre lots. He indicated the lots were to be sold as summer cabin sites, with each site providing its own sewage treatment systems and water supply. After a review of the submitted Environmental Checklist, the County Planning Department issued a Declaration of Non-Significance, thus negating the necessity for an EIS.

Thereafter, the Yakima Nation timely appealed that Declaration of Non-Significance to the Yakima County Board of Commissioners. The grounds for the appeal

[5] Following the approval of the short plats, Mr. Brendale and the Yakima Nation exchanged offers and counteroffers for the sale of his property. Unfortunately, they were unable to agree on a price as the Tribe valued the property in light of the development restrictions imposed on property within the Closed Area by the Yakima Nation zoning regulations and Mr. Brendale valued the property based upon its recreational development potential as permitted by the zoning regulations of Yakima County.

were two-fold: (1) that Yakima County was without authority to regulate the land use of the Brendale property and (2) that the proposed Brendale development would significantly affect the environment and therefore an EIS was required. Hearings on the Tribe's appeal were conducted by the County Commissioners on August 1, 2, 8 and 9, 1983. During the early states of the hearings, the Yakima Nation strenuously argued the regulatory jurisdictional issue but, based upon advice from the County legal department, the Commissioners concluded that the appeal was properly before the Board and limited the appellants to presenting evidence as to the EIS issue only. Following hearing testimony from county and tribal witnesses, the Commissioners reversed the decision of the County Planning Department and ordered the preparation of an EIS. The county was in the early stages of preparing an EIS when the present action was initiated by the Yakima Nation.

In addition to the factual background as set forth above, the court makes the following specific factual findings:

FINDINGS OF FACT

1. The proposed Brendale subdivision concerns the following described real property situated in Yakima County, Washington:

> The Northwest Quarter and Southwest Quarter of the Southwest Quarter of the Northwest Quarter of Section 14, Township 8 North, Range 14 East, W.M.

The property is located approximately 25 miles Southwest of the community of White Swan and is northwest of the Intersection of Tepee Creek and IXL roads.

2. The proposed subdivision is fee patent land located within the exterior boundaries of the Yakima Indian Reservation. The property is within the "Closed Area" of the reservation which is accessible only by members of the Yakima Indian Nation and non-members holding permits from the Tribe or the Bureau of Indian Affairs.

3. The Closed Area covers approximately 807,000 acres, 740,000 of which falls within Yakima County. Of the latter figure, 25,000 acres (or 3.3%) is fee land. The St. Regis Paper Company owns approximately 18,000 of this fee land. The remaining 7,000 fee acres are owned by Indians and non-Indians.

4. The proposed subdivision covers an area of 20 acres and includes ten two-acre lots. The development contemplates the placement of recreational summer cabins and/or travel trailers on the lots.

5. Each lot within the proposed subdivision is to be served by an individual well and an on-site sewage disposal system consisting of a septic tank with drain field or a holding vault. Electricity is to be provided by private generators.

6. The only road access to the proposed subdivision is via Bureau of Indian Affairs roads. The nearest county road is over 20 miles from the project.

Interior access to the lots would be provided by private roads consisting of re-graded existing logging spur roads or newly constructed roads. The roads would be dirt surfaced and would be maintained by a homeowner's association.

7. The proposed 20 acre subdivision is within a 160 acre quarter section owned by Philip Brendale, the North-

west quarter of Section 14, Township 8 North, Range 14 East, W.M. The proposed plat is bordered on the East and North by other lands within the quarter section owned by Mr. Brendale. It is bordered on the South by lands owned in fee by the St. Regis Paper Company and on the West by lands held in trust by the United States.

The quarter section owned by Mr. Brendale is bordered on the South and East by lands owned in fee by the St. Regis Paper Company and on the North and West by lands held in trust by the United States.

8. The subject property and all surrounding lands are forested.

9. There are currently no structures located on the subject property or on the quarter section parcel owned by Mr. Brendale.

10. The current land uses of the surrounding property include hunting and fishing, food gathering, herb gathering (for medicinal and spiritual purposes), timber production and wildlife habitat.

11. The subject property and all surrounding properties are within the Reservation Restricted Area (Closed Area) use district pursuant to the Yakima Indian Nation Zoning Ordinance. The purpose of the Reservation Restricted Area is to "insure continuation of the tribal natural resources and to insure the treaty right of tribal members to have an area in which they may camp, hunt, fish and gather roots and berries in the tradition of their culture". Within the Reservation Restricted Area no private buildings are permitted to be constructed.

12. Road construction and cabin site preparation will cause disruptions, displacements, compactions and/or covering of soil and will change ground surface relief features.

13. The proposal will cause a deterioration of ambient air quality due to vehicle exhaust emissions, dust raised on the interior and exterior access roads, and smoke from individual fireplaces or fires.

14. The proposed cabins and private roads will cause changes in absorption rates and drainage patterns. The proposal may cause deterioration of surface water quality due to runoff from disturbed sites. The proposal may alter the direction or rate of flow of ground water and may change the quantity of ground waters by direct withdrawal from wells. The proposal may cause the deterioration of ground waters through seepage from waste water, garbage and sewer facilities.

15. The proposal will result in the destruction of some trees and natural vegetation due to cabin and road construction. The proposal may result in the introduction of new species of flora into the area through gardens or through inadvertent introduction such as weeds brought in with hay.

16. The proposal will result in the deterioration of existing wildlife habitat due to runoff, road and cabin construction, and the introduction of domestic pets. The proposal is likely to cause a change in the movement patterns of wildlife such as deer and elk due to the subject property's proximity to a wildlife migration corridor.

17. The proposal may result in the increase in the rate of use of fuel wood.

18. The proposal will increase existing noise levels due to human activity, vehicles, and generators.

19. The proposal will produce new light due to the artificial lights associated with human occupancy.

20. The proposal will result in the alteration of the present land use of the area. The proposal is a complete change from the current use of the subject property and adjoining properties. Further, the developer indicates there will probably be future development of lands he owns to the East and North of the subject property.

21. The proposal will alter the location, distribution and density of human population in the area. The Closed Area is uninhabited except for short term or seasonal use.

22. The proposal will result in the generation of additional vehicular movement due to increased traffic on the interior and exterior access roads.

23. The proposal will result in the need for new or altered governmental services in the areas of police and fire protection. The increased fire hazard caused by human occupancy potentially endangers the surrounding forest lands, wildlife, wildlife habitat, water quality, and cultural and historical sites.

24. The location of cabins on the property will inevitably lead to the need for increased police protection to prevent vandalism and to protect residents.

25. The proposal will result in the need for new systems for water, sewage and solid waste disposal.

26. The timber harvested from the restricted lands within the Closed Area is a major source of income for the

Yakima Nation. Approximately 90 percent of the annual Tribal income is derived from the timber harvest.

27. The Closed Area is an integral part of the traditional Washat religion practiced by many tribal members in that it provides a unique place to gather foods and herbs.

28. "Sweathouses" and other places or items of cultural or religious significance are located within the Closed Area. At least one traditionally used "sweathouse" location lies within one to two miles of the subject Brendale property.

29. The Yakima Nation is in the process of expending considerable time and money to develop an extensive big game management program within the Closed Area. Field studies are presently underway which preliminarily show that elk herds migrate through Tepee Creek drainage basin—the location of the Brendale proposed development.

30. A major elk wintering range lies three to five miles from the Brendale property.

31. Mule deer also use the area in the vicinity of the Brendale property as a migration corridor.

32. There are no permanent residences in the Yakima County portion of the Closed Area.

33. The Closed Area of the Yakima Nation is a unique area. It has remained relatively undeveloped. Over the years its forest has provided considerable economic benefits to the tribe; its waters, wildlife, and soil have provided an abundance of food and its protected existence has kept intact the Closed Area's intangible but critical cultural values.

34. The preponderance of the evidence has convinced this court that the Closed Area is an integral part of the Yakima Indian Nation. As such, the Tribe must be able to exercise regulatory control over the area, including the Brendale fee land. To deprive the Yakima Nation of this authority would unquestionably threaten its political integrity, its economic security and the general health and welfare of the tribe and its members.

35. Yakima County's interest in regulating the Brendale property is limited; the only interest articulated by the county was the general interest of providing regulatory functions to its taxpaying citizens. Yakima County does not contend otherwise and the court finds that the Tribe's exercise of its regulatory authority over the fee land will not have effects outside the boundaries of the reservation. In no significant way will the Tribe's regulation of Mr. Brendale's property negatively affect defendant Yakima County.

LEGAL ANALYSIS

The court's legal analysis must focus on two issues: the regulatory jurisdiction question; and, the Yakima Nation's Section 1983 claim.

A. JURISDICTION TO REGULATE LAND USE:

The resolution of the jurisdictional dispute requires a two-step analysis. The court must first decide whether the Yakima Nation has any authority to regulate the activities of Mr. Brendale on his Closed Area fee land. If the tribe does indeed have that power, then the inquiry is whether Yakima County may exercise its concurrent jurisdiction over the same property. Although the two steps

are distinct, there is some overlap in the analytical framework.

1. TRIBAL AUTHORITY: The Montana Test.

Although Indian Tribes possess "attributes of sovereignty over both their members and their territory", *United States v. Wheeler,* 435 U.S. 313, 323 (1975), the dependent status of tribes and their diminished status as sovereigns limits their power in relations between a Tribe and nonmembers of the Tribe. *Id.* at 326. In fact, Indian Tribes have been divested of the power to exercise any criminal jurisdiction over non-Indians. *Oliphant v. Suquamish Indian Tribe,* 435 U.S.1 191 (1978). Similarly, a Tribe's inherent hower to exert civil jurisdiction over non-Indians has been diminished. While a Tribe does possess the power to "exclude nonmembers entirely or to condition their presence on the reservation", *New Mexico v. Mescalero Apache Tribe,* 103 S.Ct. 2378, — (1983), apparently that power may be exercised over non-Indian fee lands only in limited circumstances. *Montana v. United States,* 450 U.S. 544 (1980). Thus, in certain situations a Tribe may "exercise some forms of civil jurisdiction over non-Indians on their reservation, even on non-Indian fee lands". *Id.* at 565. Unfortunately, the parameters of that power are anything but settled; nevertheless, the Court has provided guidance which is pertinent to the case at hand.

The *Montana* Court identified two situations in which the exercise of tribal civil jurisdiction over non-Indian fee land may be appropriate. The first instance is where a non-Indian, through a business relationship or otherwise, has entered into a "consensual relationship" with the

tribe or its members. *Id.* at 565. Such is not the case here as there is no evidence of any "consensual relationship" between the Yakima Nation and Brendale which would place him within the authority of the Tribe.

The second situation described by the *Montana* Court is where the non-Indian's conduct "threatens or has some direct effect on the political integrity, the economic security or the health or welfare of the tribe." *Id.* at 566. Thus, absent a "consensual relationship", the critical factual determination which must be made in deciding whether a Tribe may regulate the land use of a non-Indian on fee land is whether the non-Indian's activities pose a threat to the Tribe's political integrity, its economic security or its health and welfare. *Id.* at 565-66; *see United States v. Anderson,* 736 F.2d 1358 (9th Cir. 1984) (tribe lacked power to regulate water use of non-Indian fee landowners within the reservation); *Cordin v. De La Cruz,* 671 F.2d 363 (9th Cir. 1982) (building, health and safety regulations applied to nonmember business located on fee lands within the reservation), *cert denied,* 459 U.S. 967 (1982); *Knight v. Shoshone & Arapahoe Indian Tribes,* 670 F.2d 900 (10th Cir. 1982) (tribal zoning ordinance applied to fee land within the reservation); *Colville Confederated Tribes v. Walton,* 647 F.2d 42 (9th Cir. 1981) (tribe allowed to exercise regulatory authority over water use of Non-Indian fee landowners within the reservation), *cert. denied,* 454 U.S. 1092 (1981): *Sechrist v. Quinault Indian Nation,* 9 I.L.R. 3064 (W.D. Wash. 1982); *Lummi Indian Tribes v. Hallover,* 9 I.L.R. 3025 (W.D. Wash. 1982).

As stated in the Findings of Fact, this court finds that Brendale's proposed development does indeed pose a threat

to the political integrity, the economic security and the health and welfare of the Yakima Nation. His planned development of recreational housing places critical assets of the Closed Area in jeopardy. While the danger to the economically important timber production is significant, of paramount concern to this court is the threat to the Closed Area's cultural and spiritual values. To allow development in this unique and undeveloped area would drastically diminish those intangible values. That in turn would undoubtedly negatively affect the general health and welfare of the Yakima Nation and its members. This court must conclude therefore that the Yakima Nation may regulate the use that Brendale makes of his fee land within the Reservation's Closed Area.

Notwithstanding the court's finding that the proposed Brendale development's threatened harm allows the Yakima Nation to exercise civil regulatory authority, the defendants argue that Congress has stripped the Tribe of any such power. Specifically, the defendants contend that when the State of Washington assumed jurisdiction over the Yakima Reservation pursuant to § 6 of the Act of August 15, 1953, 67 Stat. 590 (Public Law 280) (hereinafter P.L. 280) the Yakima Nation was divested of its inherent tribal authority to regulate the activities of non-Indians on deeded land.[6] The gist of their argument is

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[6] WASH. REV. CODE § 37.12.010 provides:

Assumption of criminal and civil jurisdiction by state. The State of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with

(Continued on following page)

that P.L. 280 was a *grant* of jurisdiction to the state (and therefore the county) which necessarily must have *withdrawn* jurisdiction from the Tribe. This argument is without merit for several reasons.

To begin with, P.L. 280 neither increased nor diminished a state's authority over the reservation activities of non-Indians. In no way can it be construed as a grant of such authority—no such grant was necessary.

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the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of R.C.W. 37.12.021 [tribal consent] have been invoked, except for the following:

(1) Compulsory school attendance;
(2) Public assistance;
(3) Domestic relations;
(4) Mental illness;
(5) Juvenile delinquency;
(6) Adoption proceedings;
(7) Dependent children; and,
(8) Operation of motor vehicles upon the public streets, alleys, roads and highways.

Provided further, that Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if chatper 36, Laws of 1963 had not been enacted.

This partial assumption of jurisdiction over Indians (based on the status of the land on which the questioned activity occurred) has been sanctioned by the Supreme Court. *Washington vs. Confederated Bands and Tribes of the Yakima Indian Nation,* 439 U.S. 463 (1979).

Under P.L. 280, states retain the same regulatory jurisdiction over the on-reservation activities of non-Indians "that they enjoyed prior to that Law". *White Mountain Apache Tribe v. State of Arizona,* 649 F.2d 1274, 1279 (9th Cir. 1981). And it is settled law that long before the enactment of P.L. 280, states (and presumably a political subdivision like Yakima County) had the power to assert sovereign powers over the reservation activities of non-Indians. *See, e.g., Draper v. United States,* 164 U.S. 240 (1896); *Utah & Northern R.R. v. Fisher,* 116 U.S. 28 (1885). As discussed *infra,* the only limitations on that power are the independent but related barriers of "infringement on the inherent tribal sovereignty", *see e.g., Williams v. Lee,* 358 U.S. 217 (1959) and the doctrine of "federal preemption". *See e.g., New Mexico v. Mescalero Apache Tribe,* 103 S.Ct. 2378 (1983).

Further evidence that P.L. 280 did not in any way affect the powers of a state over non-Indians is the law's purpose. P.L. 280 was designed to remedy the problem of the lack of state jurisdiction over *Indians* in their dealings (criminal or civil) with non-Indians. *See* Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians,* 22 U.C.L.A. Law Rev. 535 (1975). The states needed Congressional authorization to exert power over Indians. No such authorization was needed, however, as to the states' authority over non-Indians. Thus, P.L.280 was *not* a grant to the states of jurisdictional powers over non-Indians. Accordingly, it cannot be construed as supplanting the tribe's authority with state au-

thority[7] or divesting the tribe of whatever inherent power it has over the reservation activities of non-Indians. *See Cardin v. De La Cruz,* 671 F.2d 363 (9th Cir. 1982), *cert. denied,* 103 S.Ct. 293 (1983); *Sechrist v. Quinault Indian Nation,* I.L.R. 3064 (W.D. Wash. 1982).[8]

2. *YAKIMA COUNTY AUTHORITY: Preemption.*

Having concluded that the Yakima Nation may exercise its regulatory authority over the Brendale property, the court's inquiry must now focus on whether Yakima County may also exert its authority over the same property, *i.e.* whether Yakima County may exercise concurrent jurisdiction. While it is unquestioned that Yakima County has the authority to exercise jurisdiction over non-Indian activities on the Reservation, *see e.g., New Mexico v. Mescalero Apache Tribe,* 103 S.Ct. 2378 (1983); *Colville Confederated Tribes v. Walton,* 674 F.2d 42, 51-53 (9th Cir.

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[7] Even if P.L. 280 were interpreted as an affirmation or expansion of the state's jurisdiction over non-Indians, it is limited to "civil litigation" and not "general state civil regulatory control" such as zoning. *See Bryan v. Itasca County,* 426 U.S. 373, 384-85 (1976); *Barona Group of Captain Grande Band v. Duffy,* 694 F.2d 1185, 1188 (9th Cir. 1982) (P.L. 280, does not enable California to impose its *regulatory* bingo laws on the reservation); *United States v. City of Humboldt,* 615 F.2d 1260 (9th Cir. 1980) (California municipality may not zone restricted lands); *Santa Rosa Band of Indians v. Kings County,* 532 F.2d 655 (9th Cir. 1976) (California county may not zone restricted lands).

[8] Both cited cases upheld the Quinault Indian Nation's application of its zoning laws to non-Indian owned deeded lands. The State of Washington exercises the same degree of P.L. 280 jurisdiction over the Quinault Indian Reservation as it does over the Yakima Reservation. *See, Comenout v. Burdman,* 84 Wn.2d 192 (1974). Implicitly then, these two cases must be interpreted as rejecting the notion that P.L. 280 stripped tribes of their civil jurisdictional authority.

1981), *cert. denied,* 454 U.S. 1092 (1981), that power is not boundless. It is limited by the twin barriers of "infringement on tribal sovereignty"[9] and "federal preemption".[10] Although related in concept, these twin barriers are independent and either standing alone may be sufficient to block the county's attempt to assert its power. *White Mountain Apache Tribe v. Bracker,* 448 U.S. at 142. In other words, Yakima County may extend its regulatory authority onto the Yakima Nation Reservation up to the point where it either infringes on the Tribe's inherent authority or where it is preempted by federal law. In this case, where the county seeks to regulate the activities of non-Indians on fee land, the inquiry must focus on the preemption barrier.[11]

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[9] The "infringement" barrier has as its foundation the right of a tribe to exercise traditional governmental functions. The exercise of state authority may be barred if it "unlawfully infringes 'on the right of Indians to make their own laws and be ruled by them'." *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 142 (1980), quoting *Williams v. Lee,* 358 U.S. 217, 220 (1959).

[10] The preemption barrier, on the other hand, is based upon the federal supremacy clause and the federal government's plenary power over Indian Tribes. See, *e.g., Ramah Navajo School Board v. Bureau of Revenue,* 458 U.S. 832 (1982); *Central Machinery Co. v. Arizona Tax Comm'n.,* 448 U.S. 160 (1980).

[11] Since the infringement barrier is derived from the right of tribal selfgovernment, it is primarily applicable where intratribal relations are implicated. *White Mountain Apache Tribe v. State of Arizona,* 649 F.2d 1274, 1275 (9th Cir. 1981). Yakima County's Regulation of Mr. Brendale's property does not violate the right of tribal selfgovernment. Concurrent jurisdiction over Brendale's property would require him to comply with the regulations of Yakima County *and* the Yakima Nation. Thus, Yakima County would not be infringing on the Yakima Nation's right to "make their own laws and be ruled by them." *See Washing-*

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When used in the context of Indian law, the doctrine of preemption is applied uniquely. Due to the "historical origins of tribal sovereignty" and the federal commitment to tribal self-sufficiency and self-determination it is "treacherous to impart . . . notions of preemption that are properly applied to other contexts." *Bracker,* 448 U.S. at 143. Unlike preemption in other contexts, Indian law preemption does not require "an express congressional statement to that effect," *Id.* at 144, nor does it even require "a narrow focus on congressional intent to preempt state law". *New Mexico v. Mescalero Apache Tribe,* 103 S.Ct. at 2386. Rather, "state [county] jurisdiction is preempted by federal law if it intereferes or is incompatible with federal and tribal interests reflected in federal law, unless the state [county] interests at stake are sufficient to justify the assertion of state [county] authority." *Id.* at 2386. In other words, a preemption analysis rests principally on a consideration and balancing of the competing federal, county and tribal interests at stake. *Id.* at 2386.

Federal and tribal interests are assessed from a broad perspective. Traditional notions of Indian sovereignty and the federal government's commitment to the promotion and protection of tribal resources and cultural values

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ton v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) (state taxation of on-reservation cigarette purchases does not intrude upon or diminish the tribe's authority to also tax); *White Mountain Apache Tribe v. State of Arizona,* 649 F.2d 1274, 1285 (9th Cir. 1981) (state hunting and fishing regulations may be applied to non-Indians on reservations without violating the right of tribal self-government).

are considerations which must be weighed on the preemption scales. *E.g., New Mexico v. Mescalero Apache Tribe,* 103 S.Ct. at 2386-2387; *Ramah Navajo School Bd. v. Bureau of Revenue,* 458 U.S. 832 (1982). On the other hand, an assessment of the county's interest is guided by more narrow and specific considerations. The concept of county sovereignty and general county governmental interests are of limited importance. *See, e.g., Warren Trading Post Co. v. Arizona Tax Comm'n* 380 U.S. 685 (1969). Yet, a state's [county's] regulatory interest will be particularly substantial if the state can point to off-reservation effects that necessitate state [county] intervention." *New Mexico v. Mescalero Apache Tribe,* 103 S.Ct. at 2387; *Colville Confederated Tribes v. Walton,* 647 F.2d at 52-53.

As stated in this court's Findings of Fact, Yakima County's interest in regulating the at-issue Brendale property is minimal. Yakima County conceded that its interest was limited to a general concern of providing regulatory functions to its tax paying citizens. Furthermore, the county did not point to any "off-reservation effects" which the Tribe's regulation of Brendale's property would produce. To the contrary, the county agreed, and this court so finds, that the Tribe's exercise of its regulatory authority over the fee land will not produce effects outside the Reservation boundary. In sum, the court concludes that Yakima County's interests tip the preemption scales only slightly.

On the other hand, the interests of the Yakima Nation weigh heavily on the preemption scales. The Closed Area provides immense benefit to the Yakima Nation. It's timber produces substantial tribal income; its flora and

fauna provide a ready source of subsistence; its sacred areas help sustain the spiritual needs of the tribal members; and its beauty most certainly contributes to the general health and welfare of the Tribe. Those resource and cultural values carry great weight. And, given the unique character of the Closed Area, it is imperative that the Yakima Nation be able to exercise complete control over its use. Accordingly, the court concludes that the interests of the Yakima Nation in exerting its authority over the Brendale property far outweighs the interests of Yakima County; thus Yakima County is preempted from exercising concurrent jurisdiction and the Yakima Nation's jurisdiction over Brendale's property is exclusive.

B. *SECTION 1983: CLAIM*[12]

The basis for the Yakima Nation's civil rights claim are twofold. First, the Tribe asserts that the County Commissioners denied it due process of law by not providing the Tribe a meaningful opportunity to be heard on the jurisdictional issue. Second, the Tribe argues that Yakima County's attempts to exercise jurisdiction over the Brendale property violated rights enforceable under Section 1983. For the reasons discussed below, the court concludes that neither of these two alleged bases of Section 1983 liability has merit.

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[12] 42 U.S.C. § 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Assuming that the Yakima Nation is a proper plaintiff in a Section 1983 action,[13] the court finds that it was not denied due process of law by the Yakima County Commissioners. The purpose of the hearings conducted on August 1, 2, 8 and 9, 1983 was to hear the Tribe's appeal of The Planning Department's Declaration of Non-Significance. The hearing was statutorily mandated to provide the Tribe with the opportunity to convince the Commissioners that the Planning Department had erred and show that Brendale's proposed development warranted the preparation of an Environmental Impact Statement—which the Tribe succeeded in doing. The hearing was neither designed as a forum to contest jurisdiction nor was it an appropriate forum for such a debate. As demonstrated by the complexity of this lawsuit and the cases cited in this opinion, Indian reservation jurisdictional disputes are not easily resolved. It is unrealistic for the Yakima Nation to expect and even demand that it be given free reign at the administrative podium to argue and present evidence pertaining to the issue of jurisdiction, particularly when the Commissioner's sole function was to determine whether an EIS was warranted. The Commissioner's decision to allow the Yakima Nation to state

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[13] The parties have expended considerable effort in debating whether an Indian Tribe such as the Yakima Nation may bring a Section 1983 action. The resolution of that issue turns on whether the Tribe is "any citizen of the United States or other *person* within the jurisdiction thereof. . . ." 42 U.S.C. § 1983 (emphasis added). Neither the court nor the litigants have located any legal precedent which directly addresses that issue. It is not, however, necessary to answer that novel question since the court concludes that the Yakima Nation has not been deprived of "any rights, privileges, or immunities secured by the Constitution and laws. . . ." *Id.*

its objections to the county's jurisdiction over the Brendale property and then going forward with the appeal hearing was the proper course of action. The Tribe suffered no infringement on its rights to due process of law. *See generally Mathews v. Eldridge,* 424 U.S. 319 (1976); *Goss v. Lopez,* 419 U.S. 565 (1975); *Goldberg v. Kelly,* 397 U.S. 254 (1970).

While the Tribe's first basis for its Section 1983 claim must fail because no due process deprivation occurred, the Tribe's second ground for relief fails because it involves a "right" which is not within the scope of Section 1983 relief. Based upon this court's conclusion that Yakima County is preempted from exerting its land use authority over the Brendale property, there can be little argument that its attempts to do so were unlawful. It can be said, therefore, that the Yakima Nation has a "right" to be free from such unlawful action. Nevertheless, not all federally created rights are "enforceable" under Section 1983. *See generally, Middlesex County Sewerage Authority v. National Sea Clammers Association,* 453 U.S. 1 (1981); *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1 (1981); *Maine v. Thiboutot,* 448 U.S. 1 (1980).

The Tribe's "right" to be free from the county's concurrent jurisdiction is derived from the doctrine of federal preemption. But for the operation of that doctrine, the Yakima Nation would be powerless to interfere with the county's authority. As mentioned previously, the source of preemption as applied in Indian law cases is the federal government's plenary power over Indian Tribes and the Supremacy Clause, U.S. Const. Art. VI, § 2. *See*

e.g., Ramah Navajo School Board v. Bureau of Revenue, 458 U.S. 832 (1982); *Central Machinery Co. v. Arizona Tax Comm'n.,* 448 U.S. 160 (1980). Of course, "traditional notions of Indian self-government" provide an important "backdrop" which color the preemption doctrine. *McClanahan v. Arizona State Tax Comm'n.,* 411 U.S. 164, 172 (1973).

The Supreme Court has held that a Supremacy Clause violation does not give rise to Section 1983 relief. *Chapman v. Houston Welfare Rights Organization,* 441 U.S. 600, 615, (1979). Mere incompatibility between federal and state (local) laws "does not, in itself, give rise to a claim 'secured by the Constitution.'" *Id.* The portion of the Civil Rights Act of 1871 now codified as Section 1983 was directed at organized terrorism and the unwillingness or inability of state officials to control the widespread violence. *Id.* at 610 n.25. Thus, Section 1983 is concerned with the relationship between individuals and the state in matters involving life, liberty or property. It was not intended to apply to the distribution of allocation of power between a state and the federal or tribal government. See *id.* at 615; *Consolidated Freightways Corp. of Delaware v. Kassel,* 730 F.2d 1139 (8th Cir. 1984) (violation of Federal Commerce Clause does not secure rights within the meaning of Section 1983) *cert. denied,* 105 S.Ct. 126 (1984). In order to be entitled to relief under Section 1983, the Yakima Nation must rely on some enforceable right beyond its Supremacy Clause-derived "right" to preempt conflicting County regulations. Thus, the court concludes that the plaintiff has not stated a Section 1983 claim and

is therefore not entitled to attorney's fees under Section 1988.[14]

ATTORNEY FEES

Based upon the dismissal of the Section 1983 claims against them, defendants Glaspey and Brendale have filed petitions for attorney fees as "prevailing parties.[15] 42 U.S.C. § 1988. A prevailing defendant in a Section 1983 case may recover attorney fees "only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant." *Hensley v. Eckerhart,* 103 S.Ct. 1933, 1937 n.2 1983; *Boatowners and Tenants Association v. Port of Seattle,* 716 F.2d 669 (9th Cir. 1983). The court finds that none of those prerequisites to fees exists in this case.

There is no contention that plaintiff's Section 1983 claims against these two defendants was vexatious or brought to embarrass them. The defendants do, however, argue that the Section 1983 claims against them were frivolous. Glaspey contends that the action was frivolous as to him because he had no ownership interest in the Brendale property. While the court does agree that the plaintiff should have extensively investigated the surrounding facts to ascertain the identity of the necessary party defendants, *see* Fed.R.Civ.P. 11, the court is unable to conclude that the inclusion of Frank Glaspey was frivolous. Defendant Brendale asserts that the suit against him was frivolous as there was no evidence that he acted "under color" of state law. Notwithstanding the court's dismissal of the Section 1983 claim on those grounds, the plaintiff's claim was not frivolous. The caselaw construing the "under color" of law language demonstrates that the application of that phrase is anything but precise. *See e.g., Howerton v. Gabica* 708 F.2d 380 (9th Cir. 1983); *Fonda v. Gray,* 707 F.2d 435 (9th Cir. 1983); *Soo v. Rosenberg,* 702 F.2d 1263 (9th Cir. 1983); *Arnold v. International Business Machines,* 637 F.2d 1350 (9th Cir. 1981). The courts' difficulty in establishing definitional parameters has resulted in almost a case-by-case analysis. For this reason, it was not unreasonable or frivolous for the plaintiff to assert that Brendale was acting "under color" of law when he sought Yakima County approval of his proposed development.

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[14] 42 U.S.C. § 1988 provides:

In any action or proceeding to enforce a provision of sections 1981, 1983, 1985, and 1986 of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

[15] During the trial the court dismissed all of plaintiff's claims against Glaspey. At the conclusion of the trial the court dismissed plaintiff's Section 1983 claim against Brendale, finding that Brendale had not acted "under color" of state law. 42 U.S.C. § 1983.

CONCLUSION

Based upon the above Findings of Fact and legal conclusions, judgment shall be entered in favor of the plaintiff as against all defendants (except Frank Glaspey) to the following intent: The court declares that the Yakima Indian Nation has exclusive regulatory jurisdiction over the land use of the Brendale property described on page 12 of this memorandum opinion.

As to plaintiff's 42 U.S.C. § 1983 claims, judgment shall be entered in favor of defendants Jim Whiteside, Graham Tollefson, Charles Klarich, Richard Anderwald, Philip Brendale and Frank Glaspey.

Plaintiff's 42 U.S.C. § 1983 claims are DISMISSED WITH PREJUDICE.

All parties shall bear their own attorney fees.

IT IS SO ORDERED. The Clerk is directed to enter this Order and forward copies to counsel.

DATED this 10th day of September, 1985.

/s/ _____
JUSTIN L. QUACKENBUSH
United States District Judge

APPENDIX D

TREATY WITH THE YAKIMAS, 1855

12 Stat. 951, June 9, 1855—Treaty

Articles of agreement and convention made and concluded at the treaty ground, Camp Stevens, WallaWalla Valley, this ninth day of June, in the year one thousand eight hundred and fifty-five, by and between Isaac I. Stevens, Governor and Superintendent of Indian Affairs for the Territory of Washington, on the part of the United States, and the undersigned Head Chief, Chiefs, Headmen and Delegates of the Yakama, Palouse, Pisquose, Wentachapam, Klikatat, Klinquit, Kow-was-say-ee, Ki-ay-was, Skin-pah, Wishham, Shyiks, Oche-choetes, Kah-milt-pah, and Se-ap-cat, Confederatel Tribes and Bands of Indians occupying lands hereinafter bounded and described and lying in Washington Territory, who for the purposes of this treaty are to be considered as one nation, under the name of "Yakama," with Kamiakun as its Head Chief, on behalf of and acting for said tribes and bands, and being duly authorized thereto by them.

CESSION OF LANDS

ARTICLE 1. The aforesaid Confederated Tribes and Bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied and claimed by them, and bounded and described as follows, to wit:

BOUNDARIES

Commencing at Mount Rainier, thence northerly along the main ridge of the Cascade Mountains to the point

where the northern tributaries of Lake Che-lan and the southern tributaries of the Methow River have their rise; thence southeasternly on the divide between the waters of Lake Che-lan and the Methow River to the Columbia River; thence, crossing the Columbia on a true east course, to a point whose longitude is one hundred and nineteen degrees and ten minutes (119°10′) which tow latter lines separate the above Confederated Tribes and Bands from the Oakinakane Tribe of Indians; then in a true south course to (952) forty-seventh (47°) parallel of latitude; thence east on said parallel to the Mail Palouse River, which two latter lines of boundary separate the above Confederated Tribes and Bands from the Spokanes; thence down the Palouse to its junction with the Mohhah-ne-she, or southern tributary of the same; thence, in a south-easterly direction, to the Snake River, at the mouth of the Tucannon River, separating the above Confederated Tribes from the Nez Perce Tribe of Indians; thence down the Snake River to its junction with the Columbia River; thence up the Columbia River to the "Big Island," between the mouths of the Umatilla River and Butler Creek; all of which latter boundaries separate the above Confederated Tribes and Bands from the Walla-Walla, Cayuse, and Umatilla Tribes and Bands of Indians; thence down the Columbia River to midway between the mouths of White Salmon and Wind Rivers; thence along the divide between said rivers to the main ridge of the Cascade Mountains; and thence along said ridge to the place of beginning.

RESERVATION

ARTICLE 2. There is, however, reserved from the lands above ceded for the use and occupation of the aforesaid Confederated Tribes and Bands of Indians, the tract of land included within the following boundaries to wit:

BOUNDARIES

Commencing on the Yakama River, at the mouth of the Attah-nam River; thence westerly along said Attahnam River to the Forks, thence along the southern tributary to the Cascade Mountains; thence southerly along the main ridge of said mountains, passing south and east of Mount Adams, to the spur whence flows the waters of the Klickitat and Pisco Rivers; thence down said spur to the divide between the waters of said rivers; thence along said divide to the Columbia River; thence along said divide to the main Yakama, eight miles below the mouth of the Satass River; and thence up the Yakama River to the place of beginning.

All of which tract shall be set apart and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said Confederated Tribes and Bands of Indians, as an Indian Reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent. And the said Confederated Tribes and Bands agree to remove to, and settle upon the same within one year after ratification of this treaty. In the meantime it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United

States; and upon any ground claimed or occupied, if with the permission of the owner of claimant.

Guaranteeing, however, the right to all citizens of the United States, to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named.

And provided, that any substantial improvements heretofore made by any Indian, such as fields enclosed and cultivated, and houses erected upon the lands hereby ceded, and which he may be compelled to abandon in consequence of this treaty, shall be valued, under the direction of the President of the United States, and payment made therefor in money; or improvements of an equal value made for said Indian upon the reservation. And no Indian will be required to abandon the improvements aforesaid, now occupied by him, until their value shall be furnished him as aforesaid.

ARTICLE 3. And provided that, if necessary for the public convenience, (953) roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right in common with citizens of the United States, to travel upon all public highways.

PRIVILEGES SECURED TO INDIANS

The exclusive right of taking fish in all the streams, where running through or bordering said reservations, is further secured to said Confederated Tribes and Bands of Indians, as also the right of taking fish at all usual and

accustomed places, in common with citizens of the territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

PAYMENT BY THE UNITED STATES

ARTICLE 4, In consideration of the above cession, the United States agree to pay to the said Confederated Tribes and Bands of Indians in addition to the goods and provisions distributed to them at the time of signing this treaty, the sum of two hundred thousand dollars, in the following manner, that is to say: sixty thousand, to be expended under the direction of the President of the United States, the first year after the ratification of this treaty, in providing for their removal to the reservation, breaking up and fencing farms, building houses for them, supplying them with provisions and suitable outfit, and for such other objects as he may deem necessary, and the remainder in annuities, as follows: for the first five years after the ratification of the treaty, ten thousand dollars each year, commencing September first, 1856; for the next five years, eight thousand dollars per year; and for the next five years, four thousand dollars per year.

All which sums of money shall be applied to the use and benefits of said Indians, under the direction of the President of the United States, who may from time to time determine at his discretion, upon what beneficial objects to expend the same for them. And the superintendent of Indian Affairs, or other proper officer, shall each year inform the President of the wishes of the Indians in relation thereto.

UNITED STATES TO ESTABLISH SCHOOLS

ARTICLE 5. The United States further agree to establish at suitable points within said reservation, within one year after the ratification hereof, two schools, erecting the necessary buildings, keeping them in repair, and providing them with furniture, books, and stationery, one of which shall be an agricultural and industrial school, to be located at the agency, and to be free to the children of the said Confederated Tribes and Bands of Indians, and to employ one superintendent of teaching and two teachers; to build two blacksmiths' shops, to one of which shall be attached a tin shop, and to the other a gunsmith's shop; one carpenter's shop, one wagon and ploughmaker's shop, and to keep the same in repair and furnished with the necessary tools; to employ one superintendent of farming and two farmers, two blacksmiths, one tinner, one gunsmith, one carpenter, one wagon and ploughmaker, for the instruction of the Indians in trades and to assist in the same; to erect one saw-mill and one flouring-mill, keeping the same in repair and furnished with the necessary tools and fixtures; to erect a hospital, keeping the same in repair and provide with the necessary medicines and furniture, and to employ a physician; and to erect, keep in repair, and provided with the necessary furniture, the buildings required for the accommodation of the said employees. The said buildings and establishments to be maintained and kept in repair as aforesaid, and the employees to be kept in service for the period of twenty years.

And in view of the fact that the head chief of the said Confederated Tribes and Bands of Indians is expected,

and will be called upon, to perform many services of a public character, occupying much of his time, the United States further agrees to pay to the said Confederated Tribes and Bands of Indians five hundred dollars per year, for the term of twenty years after the ratification hereof, as salary for such person as the said (954) Confederated Tribes and Bands of Indians may select to be their Head Chief; to build for him at a suitable point on the reservation a comfortable house and properly furnish the same, and to plough and fence ten acres of land. The said salary to be paid to, and the said house to be occupied by, such Head Chief so long as he may continue to hold that office.

KAMAIAKUN IS THE HEAD CHIEF

And it is distinctly understood and agreed that at the time of the conclusion of this treaty Kamaiakun is the duly elected and authorized Head Chief of the Confederated Tribes and Bands aforesaid, styled the Yakama Nation, and is recognized as such by them and by the commissioners on the part of the United States holding this treaty; and all the expenditures and expenses contemplated in this article of this treaty shall be defrayed by the United States, and shall not be deducted from the annuities agreed to be paid to said Confederated Tribes and Bands of Indians. Nor shall the cost of transporting the goods for the annuity payments be charged upon the annuities, but shall be defrayed by the United States.

RESERVATION MAY BE SURVEYED

ARTICLE 6. The President may, from time to time, at This discretion, cause the whole or such portions of

such reservation as he may think proper, to be surveyed into lots, and assign the same to such individuals or families of the said Confederated Tribes and Bands of Indians as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the Treaty with the Omahas, so far as the same may be applicable.

ANNUITIES NOT TO PAY DEBTS OF INDIVIDUALS

ARTICLE 7. The annuities of the aforesaid Confederated Tribes and Bands of Indians shall not be taken to pay the debts of individuals.

ARTICLE 8. The aforesaid Confederated Tribes and Bands of Indians acknowledge their dependence upon the government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations upon the property of such citizens.

And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed compensation may be made by the government out of the annuities.

NOT TO MAKE WAR BUT IN SELF DEFENSE

Nor will they make war upon any other tribe, except in self-defense, but will submit all matters of differences between them and other Indians to the government of the United States or its agent for decision, and abide thereby. And if any of the said Indians commit depredations on

any other Indians within the Territory of Washington or Oregon, the same rule shall prevail as that provided in this article in case of depredations against citizens. And the said Confederated Tribes and Bands of Indians agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE 9. The said Confederated Tribes and Bands of Indians desire to exclude from their reservation the use of ardent spirits, and to prevent their people from drinking the same, and, therefore, it is provided that any Indian belonging to said Confederated Tribes and Bands of Indians, who is guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her annuities withheld from him or her for such time as the President may determine.

WENATSHAPAM FISHERY RESERVED

ARTICLE 10. And provided, that there is also reserved and set apart from the lands ceded by this treaty, for the use and benefit of the aforesaid Confederated Tribes and Bands, a tract of land not exceeding in quantity one township of six miles square, situated at the forks of the Pisquose or Wenatshapam River, and known as the "Wenatshapam Fishery," which said reservation shall be surveyed and marked out whenever the President may direct, and be subject to the same provisions and restrictions as other Indian Reservations.

WHEN TREATY TO TAKE EFFECT

ARTICLE 11. This treaty shall be obligatory upon the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

(955) In testimony whereof, the said Isaac I. Stevens, Governor and Superintendent of Indian Affairs for the Territory of Washington, and the undersigned Head Chief, Chiefs, Headmen, and delegates to the aforesaid Confederated Tribes and Bands of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

Isaac I. Stevens
Governor and Superintendent
Kamaiakun
His X mark
Skloom
His X mark
Owhi
His X mark
Te-cole-kun
His X mark
La-hoom
His X mark
Me-ni-nock
His X mark
Elit Palmer
His X mark
Wish-oh-kmpits
His X mark
Koo-lat-toos
His X mark
Shee-ah-cotte
His X mark

Tuck-quille
His X mark
Ka-loo-as
His X mark
Scha-noo-a
His X mark
Sla-kish
His X mark

Signed and sealed in presence of:

James Doty
Secretary of Treaties
Mie. Cles (Jean Charles)
Pandosy
O.M.I.
Wm. C. McKay
W. H. Tappan
Sub Indian Agent, W.T.
C. Chirouse
O.M.I.
Patrick McKenzie
Intrepreter
A. D. Pamburn (Pambrun)
Intrepreter
Joel Palmer
Supt. of Indian Affairs, O.T.
W. D. Biglow
A. D. Pamburn (Pambrun)
Intrepreter

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the said Senate did, on the eighth day of March, one thousand eight hundred and fifty-nine, advise

and consent to the ratification of the same by a resolution in the words and figures following, to wit:

"IN EXECUTIVE SESSION"
SENATE OF
THE UNITED STATES
March 8, 1859

"Resolved, (two thirds of the senators present concurring), that the Senate advise and consent to the ratification of treaty between the United States and the Head Chief, Chiefs, Headmen, and delegates of the Yakima, Palouse, and other Confederated Tribes and Bands of Indians, occupying lands laying in Washington Territory, who, for the purpose of this treaty, are to be considered as one nation, under the name of "Yakima," with Kamaiakun as its Head Chief, signed 9th June, 1855.

Attest:

"Asbury Dickens, Secretary."

Now, therefore, be it known that I, James Buchanan, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of March eighth, one thousand eight hundred and fifty-nine, accept, ratify, and confirm the said treaty.

(956) In testimony whereof, I have hereunto caused the seal of the United States to be affixed, and have signed the same with my hand.

Done at the City of Washington, this eighteenth day of April, in the year of our Lord one thousand eight hun-

dred and fifty-nine, and of the independence of the United States the eighty-third.

James Buchanan

By the President:

Lewis Cass, Secretary of State